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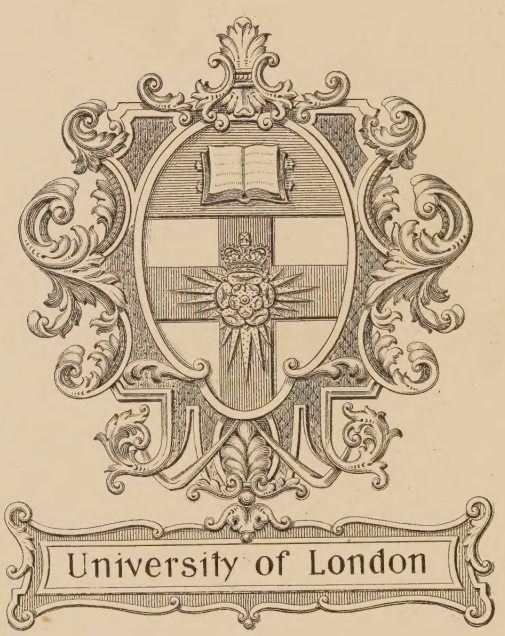

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1935.

THE

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1935.

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OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

IN THE MATTER OF THE LEGITIMACY DECLARATION ACT, 1858 (21 & 22 VICT. C. 93), AS AMENDED BY THE JUDICATURE (CONSOLIDATION) ACT, 1925 (15 & 16 GEO. 5, C. 49), SS. 188, 226, AND SCHEDULE 6

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April 17, 18, 19, 20, 24, 25, 26; *July* 13.

AND

IN THE MATTER OF THE LEGITIMACY ACT, 1926 (16 & 17 GEO. 5, C. 60)

AND

IN THE MATTER OF ARTHUR HENRY DAVY (KNOWN AS ROBERT HENRY DAVY).

Legitimacy Declaration—Evidence—Declarations of deceased relatives made ante litem motam—Extension to Petitions under the Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60), *of the rule admitting Declarations in Pedigree cases generally—Relationship of Declarant to Petitioner itself an issue for decision on Petition—Declarations "ante litem motam" defined as to their date.*

The rule in pedigree cases that declarations of deceased relatives made "ante litem motam" are admissible in evidence extends to

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proceedings under the Legitimacy Act, 1926. The declarations are admissible in the latter class of proceedings in spite of the fact that the legal relationship of the declarant to the party sought to be legitimated is incidentally part of the subject-matter for decision. Although the party sought to be legitimated is filius nullius until decree and therefore before decree can have no relations, the result of excluding the declarations would be to take away by a rule of evidence the benefit that the statute intended to confer upon persons whose birth has been originally illegitimate apart from the operation of the statute.

The true construction to be placed upon the limitation ante litem motam in cases of legitimation is not a reference to the commencement of proceedings under the statute but the origination of controversy in the family in which legitimation is sought sufficient to create bias in the minds of its members at the moment of their declarations which are subsequently put forward as evidence.

THE PETITION of Arthur Henry Davy dated July 12, 1932, alleged that he was the natural child of Mary Chatham née Mary Davy, spinster, by Edward Chatham, bachelor, neither of whom was married on July 16, 1879, the date of his birth, but that they were subsequently married on December 29, 1884. He accordingly claimed a declaration that his parents were lawfully married and that by virtue of their marriage he became legitimated as from the commencement of the Legitimacy Act, 1926—namely, January 1, 1927. It was set out in the petition that Edward Chatham died domiciled in England on January 7, 1929, intestate, leaving estate of the value of 15,102*l.* 1*s.* 1*d.* and two children him surviving—namely, the petitioner and Edward Alfred Chatham, who was born on July 13, 1895, and died on March 16, 1930, leaving a will of which certain parties now cited were executors and trustees, E. A. Chatham having claimed to be the only child of Edward Chatham and having as such received the whole estate of Edward Chatham in his intestacy. The Attorney-General was a respondent to the petition pursuant to the Judicature (Consolidation) Act, s. 188, sub-s. 4, and by his answer insisted on the strict proof of the case of the petitioner. The parties cited filed answers denying that the petitioner was the child of E. Chatham and alleging that he was the child of Mary Davy by some other person, and accordingly never became legitimated in the manner alleged. The evidence

both in support of and in opposition to the case of the petitioner consisted largely of the substance of declarations said to have been made by persons since deceased who at the institution of the proceedings and pending a decree were not legally related to the petitioner. Thus E. Chatham, putative father of the petitioner, when challenged with his paternity in 1918 had alleged that the petitioner was the son of Mary Davy born before Chatham first met her and added that he had believed the petitioner to be the child of the parents of Mary Davy and had continued so to believe until five years after his marriage to her, when she owned that the child was her own. The petitioner himself in evidence admitted that in spite of a residence with his putative parents for many years he then made no effort to assert his parentage or to obtain recognition of it from his putative father and that it remained without the recognition of his putative father down to his death and that he had never assumed the name of Chatham and had made no claim to be regarded as legitimate until 1930. To the contrary effect there was evidence that in 1884, at a time when there had not been any controversy in the family as to the legitimacy of the petitioner, Chatham, on the occasion of the christening of the petitioner, had stated that he was standing godfather to his own child and that he was in the habit of referring to the petitioner and Edward Alfred Chatham as " my lads " and had stated that he had made provision for the petitioner and his wife. Further evidence in the same direction was that when after a quarrel the petitioner left his home, Chatham offered him money to return, that Robert Davy, the father of Mary Davy, and Thomas Hugh Davy, her brother, had stated that the petitioner was the son of Mary Davy and Chatham, that Thomas Hugh Davy had threatened to publish the paternity of Chatham when the petitioner left his home and Chatham offered him money to return, and that Edward Alfred Chatham had said that he had an elder brother. For the most part these declarations had been made before any controversy arose as to the legitimacy of the petitioner.

On the evidence generally the Court was satisfied that

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Mary Davy, spinster, was the mother of the petitioner, and that she was married to Edward Chatham, bachelor, on December 29, 1884, and the substantial issue remaining was as to his paternity of the petitioner. On the latter question objection was taken on behalf both of the Attorney-General and the parties cited to the preception of the declarations in evidence. They were admitted by consent de bene subject to argument as to their proper reception on the present issue having regard to the general rule excluding hearsay evidence and the difference (if any) between the application of the rule in pedigree cases generally and those arising under the Legitimacy Act.

H. S. Preston K.C. and *G. C. Tyndale* for the petitioner. The case is, to all intents and purposes, one of pedigree. It is immaterial that the petitioner becomes legitimate by statute only. The test of admissibility in evidence of declarations under the Legitimacy Act as well as in pedigree cases is whether anything in the nature of litis contestatio has occurred before their date: *Monkton* v. *Attorney-General.* (1) The declarations must be those of relatives and made ante litem motam: Stephen's Digest of the Law of Evidence, 11th ed., p. 43. It is immaterial that the legal relationship of the declarant in fact is part of the issue to be decided: *Murray* v. *Milner* (2) (per Fry L.J.). The learned Lord Justice, in reference to an argument that either the legal relationship of the declarant must be admitted before his declaration could be given in evidence, or the relationship must be denied, which would have the effect of excluding the declaration, said that the argument could not prevail because of the difficulty which it created. A mere technicality is involved, as pointed out in *In re Perton (deceased)*; *Pearson* v. *Attorney-General.* (3) In *Doe* v. *Davies* (4) Denman C.J. points out with reference to the admissibility of the evidence that the judge must decide whether the declarant has been shown to be a putative member of the family, although the relationship is actually the issue in the cause.

(1) (1831) 2 R. & My. 147, 160.
(2) (1879) 12 Ch. D. 845, 849.
(3) (1885) 53 L. T. 707, 709.
(4) (1847) 10 Q. B. 314, 323, 324.

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A declaration by a putative father of the legitimacy of his child was admitted in *In re Turner*; *Glenister* v. *Harding*. (1) In this case declarations made before 1918 when controversy arose are admissible. The declaration, however, by Edward Chatham that he had no access to the mother of the petitioner at the material times must be excluded: *Goodright* v. *Moss*. (2) The condition involved in the limitation ante litem motam is that the declarant must have an even mind and that there must be no controversy existing to bias it: *Butler* v. *Mountgarret*. (3) There must be no controversy in the family of the declarant at the time of his declaration although facts may exist leading to possible controversy: per Wightman J. in *Shedden* v. *Patrick*. (4) At the time when Chatham declared that the petitioner was the child of another man, controversy had arisen; there was no even mind. The commencing date of the "lis" which will exclude declarations subsequently made is at all events the origin of the controversy, not the commencement of actual litigation: per Mansfield C.J. in the *Berkeley Peerage Case*. (5) The family tradition which is the subject of the declaration must proceed from persons having such a connection with the parties to whom it relates that it is likely that they are speaking the truth: *Whitelocke* v. *Baker*. (6) This could not be applied to the denial of paternity by Chatham; controversy had then ipso facto arisen.

Wilfrid Lewis and *G. Bankes* for the Attorney-General. Legitimation under the statute and pedigree cases stand on different footings with regard to the admissibility of declarations made ante litem motam. If the issue is merely one of legitimation, no lis can be said to have existed before January 1, 1927, the commencement of the Legitimacy Declaration Act, with the result that all declarations made prior to that date are admissible. But if the issue is one of pedigree no declarations made ante litem motam are admissible as those of deceased members of the family to which the petitioner claims to belong and therefore as those of his relations, because at

(1) (1885) 29 Ch. D. 985.
(2) (1777) 2 Cowp. 591, 594.
(3) (1859) 7 H. L. C. 633, 640, 641.
(4) (1860) 2 Sw. & Tr. 170, 188.
(5) (1811) 4 Camp. 401, 416, 417.
(6) (1807) 13 Ves. 511, 514.

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the present stage and before decree he is nullius filius and can have no relations even if living in intimacy among members of that family : *Doe* v. *Barton* (1), approved in *Doe* v. *Davies* (2), relied on on behalf of the petitioner. In *Plant* v. *Taylor* (3) evidence by a son of the declarations of his father of the marriage of the latter, rendering the son legitimate, was rejected on the ground that no relationship between them had been established : *Monkton* v. *Attorney-General* (4), relied on by the petitioner, was a pedigree case and is distinguishable.

Such declarations, therefore, as those of Thomas Hugh Davy are inadmissible. In the present case controversy as to the relationship of the petitioner to the family must be said to have arisen after the threat of Thomas Hugh Davy to expose Chatham. There was then controversy capable of litigation upon which the parties interested took opposite sides : *Butler* v. *Mountgarret.* (5) But the true view is that this is not a pedigree case at all and no declaration could have had any value nor could any relief have been claimed before the passing of the Legitimacy Act, 1926. No controversy which could be said to amount to lis mota arose till then, but since then all declarations are admissible both for and against the claim of the petitioner.

Once the controversy has arisen it is immaterial that no lis as such existed. An actual suit is not essential in English law to constitute " lis " : per Willes J. in *Butler* v. *Mountgarret* (5) ; *Shedden* v. *Patrick.* (6)

The rule as to admissibility of declarations is laid down by Lord Eldon L.C. in *Whitelocke* v. *Baker.* (7) They are " admitted upon the principle, that they are the natural effusions of a party who must know the truth ; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

If, contrary to our contention, this is a pedigree case, all declarations made before 1927 are admissible, and amongst them the denial of E. Chatham of paternity in 1918.

(1) (1837) 2 M. & Rob. 28.
(2) 10 Q. B. 314, 323, 324.
(3) (1861) 7 H. & N. 211, 237.
(4) 2 R. & My. 147, 160.
(5) 7 H. L. C. 633, 641.
(6) 2 Sw. & Tr. 170, 188.
(7) 13 Ves. 511, 514.

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But if this is not a pedigree case the passage of the judgment of Brett M.R. in *Haines* v. *Guthrie* (1) is in point in which he says: "I think Lord Blackburn (in *Sturla* v. *Freccia* (2)) intended to make an exhaustive definition of the exceptions to the rule against the admission of hearsay evidence, and he distinctly states that in questions of pedigree the statements of deceased members of the family are evidence to prove pedigree."

[They also referred to the *Berkeley Peerage Case* (3); *Frederick* v. *Attorney-General* (4); and *Price* v. *Lord Torrington.* (5)]

R. H. Bayford for the parties cited. The declarations to be admissible must be those of a blood relation: *Shrewsbury Peerage* Case. (6) Lis mota denotes the development of family controversy, and the denial of paternity by Chatham was before controversy: *Frederick* v. *Attorney-General.* (4) Chatham's declaration as to the time of the petitioner's birth is admissible to that extent. *Goodright* v. *Moss* (7) is not at variance on that point.

[He referred to *Hill* v. *Hibbit.* (8)]

Cur. adv. vult.

July 13. LANGTON J. [after stating the facts as to the maternity of the petitioner and the marriage of Mary Davy to Chatham, proceeded as follows:] The general evidence in the case, apart from documents of record such as certificates of birth, baptism and marriage, consisted to a large extent of statements said to have been made by persons now dead. At the outset, therefore, it falls to be considered how far such evidence is admissible in a case of this class, that is, in a case brought under this comparatively new Act, the Legitimacy Act, 1926. I take the view that some of the matters of this nature which have been objected to in the present case, on the ground of hearsay, are not matters of hearsay at all, but are, as counsel for the petitioner contended, either direct admissions or accounts of actual conversations between parties, some of

(1) (1884) 13 Q. B. D. 818, 830.
(2) (1880) 5 App. Cas. 623.
(3) 4 Camp. 401, 417.
(4) (1874) L. R. 3 P. & M. 270.
(5) (1703) 1 Salk. 285.
(6) (1858) 7 H. L. C. 1.
(7) 2 Cowp., 591.
(8) (1870) 19 W. R. 250, by James V.-C. in note.

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whom are now dead, by the survivors. As to the matters which are truly matters of hearsay, I have to consider whether the well known rule concerning what are called pedigree cases should properly be applied to an investigation under the Legitimacy Act. The guiding rule in pedigree cases is, I think, well summed up in Phipson on Evidence, 7th ed., at p. 297: "Declarations by deceased relatives, made ante litem motam are admissible to prove matters of family pedigree."

Lord Blackburn in *Sturla* v. *Freccia* (1) stated the ground upon which this exception to the general law of evidence had been made: "I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice." This exception is now well grafted upon the law of evidence, and to my mind the same conditions and the same urgency apply to matters of legitimacy as apply to questions of pedigree. No one, I imagine, would deny that it is of equal importance that justice should be done upon a point of legitimacy as upon a point of pedigree, and equally the matters relating to both are as a rule matters relating to a long time past. Consequently upon the broad issue as to whether cases under the Legitimacy Act, 1926, are to be classed as pedigree cases in the matter of admissibility of hearsay evidence I am of opinion that the same exception should be allowed.

At an early stage of this case counsel on behalf of the Attorney-General took two other far-reaching objections to much of the evidence put forward on behalf of the petitioner. It is nothing against the value of these objections that if they be valid, they must also apply to exclude a very important part of the evidence for the respondents. The objections were taken in the public interest, and their effect upon this particular litigation is a matter of very small concern to the Attorney-General. The first of these objections touches a question which has been before the Courts in various forms in other cases, but has never, I think, assumed the proportion which it takes in the

(1) 5 App. Cas. 623, 641.

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present instance. Counsel argued that even supposing that cases under the Legitimacy Act could be classed as pedigree cases, no declarations from deceased members of the Davy or Chatham families could be received in evidence, since the petitioner, being ex concessis illegitimate at birth, has not, and cannot be treated as having, any relatives. Being filius nullius he has no family, and, therefore, can have no relatives. If this be in truth a valid objection, which must be upheld by the Court, it is apparent that in a very large number of cases of this class the Court will be obliged to take away with one hand, by a rule of evidence, much of what the Legislature by a statute has attempted to confer with the other hand upon persons of illegitimate birth. I have been at pains, therefore, to examine the authorities upon which this objection is rested, and I do not disguise my satisfaction in finding that they do not constitute a very formidable array. The case first cited by the majority of text-books in support of this objection is that of *Doe* v. *Barton*. (1) The action was for ejectment, in respect of land belonging to a testator who had devised his property to his illegitimate sons for life, with remainder in tail to their children. It was sought to prove that one of the illegitimate sons of the testator was dead without issue ; and the somewhat roundabout means employed was to call an individual who stated that he was a son-in-law of another of the illegitimate sons, and that he had heard his father-in-law say that his natural brother (the party whose death it was sought to prove) was dead without issue. Patteson J. rejected this evidence without troubling to formulate any very precise rule of objection. In the circumstances this is not perhaps surprising, since the evidence at its best could hardly have been of a very forcible character. Having stated that the Courts had not latterly been disposed to enlarge the exception in favour of declarations of this kind, the learned judge goes on to observe : " The person whose declarations are now tendered in evidence was not, in point of law, a member of the family of his reputed father ; and it would be opening a new and a wide door to such evidence

(1) 2 M. & Rob. 28.

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if it were to be received merely because the party was living in habits of intimacy amongst those who were members of the family." This judgment was given as long ago as 1837, in times when a statute framed in the spirit which has animated the passing of the Legitimacy Act would have been almost unthinkable. Furthermore, the danger against which Patteson J. is there taking precautions, namely, that of admitting in evidence declarations of loose living people, whose evidence would be likely to be untrustworthy, is a danger against which it would not be difficult for the Courts to protect themselves in modern times. We are very familiar nowadays with the distinctions between admissible evidence and testimony of any real evidentiary value. Jury trials are becoming less common in civil matters, and no one, I think, would feel real concern nowadays in leaving a judge to assess at its proper value evidence which had sprung from an obviously disreputable source.

The next case which is commonly cited in support of the principle contended for by the Attorney-General is that of *Doe* v. *Davies*. (1) This case was heard in the year 1847, and the judgment of the Court, which comprised Lord Denman C.J., Coleridge, Wightman, and Erle JJ., was delivered by the Chief Justice. In so far as the decision is relevant to the matter at present under discussion it would seem to be almost a stronger authority against the contention of the Attorney-General than it is in his favour. It is true that the judgment of Patteson J. in *Doe* v. *Barton* (2) is in general terms approved, but on the other hand the judgment of the Court is directed more immediately towards approving and upholding a ruling of Coltman J. which appears helpful rather than harmful to the petitioner in the present instance. A question had been litigated before a jury at Cardigan Assizes as to the legitimacy of a lady named Elizabeth Stevens, and the question of her legitimacy turned upon the single point whether her mother was lawfully married to a Mr. John Davies. In the action Coltman J. admitted hearsay evidence tendered on behalf of

(1) 10 Q. B. 314. (2) 2 M. & Rob. 28.

the defendants, who were asserting that Mrs. Stevens was legitimate, of a declaration by her concerning her mother's marriage. Objection was apparently taken to the admission of this declaration upon various grounds, but first and foremost upon the ground that at the time when the declaration was admitted in evidence she had not been conclusively proved to be a member of her father's family. Since this was actually the sole point for the jury to decide, it is not difficult to understand that the objection was taken with considerable force and point. The full Court, however, approved the action of Coltman J. in admitting the declaration, upon the ground that it was for the judge alone to say whether the condition precedent necessary to make such a declaration admissible in evidence had or had not been fulfilled. The Court added that it made no difference to the judge's ruling, and did not constitute any flaw in the ruling, that he was obliged to predetermine for the purposes of this ruling the very question which the jury had subsequently to decide. I must confess to a certain difficulty in following this line of argument, but I may perhaps be pardoned for thinking that doctrines which give rise to such tortuous sinuosities of dialectic do not rest on a very broad or solid basis.

The same point in a slightly different form arose in the case of *Murray* v. *Milner*. (1) A will of a deceased father was offered in evidence to prove the illegitimacy of his children. Fry L.J., sitting then as a judge of first instance in Chancery, dealt with the contention in the following terms: "It has been argued that the will is not capable of being looked at as a declaration by the deceased father of the claimant, because it is said you must either admit the marriage before you can shew that there is any relationship between the declarant and the claimant, or you must deny the existence of the relationship, and then it would be the declaration of a mere stranger. In my judgment that argument cannot prevail. It would lead to great difficulty." This case was strongly relied upon by counsel for the petitioner as an authority against the contention of the Attorney-General, and in my view this summary

(1) 12 Ch. D. 845, 849.

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dismissal of the objection is not below its deserts. In a slightly later case, *In re Perton (deceased)*; *Pearson* v. *The Attorney-General* (1), Chitty J. brings together and exposes some of the difficulties and absurdities to which this class of contention may lead. The precise point in that case was as to whether a deceased man's declarations as to his own legitimacy or illegitimacy were admissible, and in the final view at which the judge arrived he deals, of course, with other grounds more pertinent to the special point in hand as supporting his conclusion. On the broader question, however, he makes these observations: "The technical reasoning for the claimant on this point was that the deceased was not a member of any family. That is a highly technical mode of putting the case. No doubt it is true that the law does not admit the declarations of deceased persons unless they are members of the family, or connected as husband or wife with the family, and by members of the family is of course meant legitimate members of the family. But, if it were necessary to reply to this technical reasoning, it seems to me it would not be too great a refinement to say of the deceased himself that he concentrates and sums up in his own person the whole of the family, he being according to the argument of the Crown, nullius filius."

I find myself heartily in accord with the view here expressed that reasoning of this kind is highly technical, and I cannot believe that a technical line of reasoning, resting upon a somewhat slender basis of authority, ought to be allowed to limit and possibly defeat the efforts of claimants who are endeavouring to obtain the advantages of the Legitimacy Act.

A further point of wide ambit upon the subject of evidence arose in this case upon the construction of the phrase ante litem motam. No one is concerned to dispute that the declarations specially received in pedigree cases must satisfy the qualification that they have been made before the "lis" in the case arises. In the present case the matter assumes urgent importance, because by far the most important part of the case for the respondents rested upon a declaration of Edward Chatham, and it was contended strongly for the petitioner

(1) 53 L. T. 707, 709.

that this declaration was post litem motam. Counsel for the Attorney-General took in the first place the broad point that, where the Legitimacy Act is concerned, there is and can be no " lis " before the date of the Act. He did not seek to limit the meaning of the expression " lis " to the narrow translation of " litigation," but he claimed that no " lis " could exist at any time at which the point subsequently in issue was not capable of being litigated. " Lis," he said, may not be confined to litigation in esse, but it cannot be extended to mean something beyond litigation in posse. Since, therefore, the question now before the Court was not capable of being litigated before the passing of the Legitimacy Act, any declaration made before the date of that Act must of necessity be ante litem motam. To this contention two answers were made: first, the word " lis " does not connote litigation at all, but only a matter of controversy; and secondly, the point in this case, namely, whether Chatham was or was not the father of the petitioner, might well have been the subject of litigation, even though the results which may now follow from an affirmative declaration to that effect could not have been the same before the Act as they will be since the passing of the Act. In support of the second point counsel for the petitioner gave as an example a gift in a will prior to the Legitimacy Act in these terms: " To the two children of Edward Chatham and his wife." It seems clear to me that a gift in these terms would raise directly the question whether Edward Chatham was the father of Harry Davy, though it is true that the decision of such an issue could not before the Act have had any effect upon the legitimacy of Davy. The other aspect of the matter, namely, the precise meaning to be attributed to the word " lis " in this connection, is by no means bare of authority. To my mind the clearest and most authoritative decision on this point is to be found in *Butler* v. *Mountgarret*. (1) Counsel for the Attorney-General relied upon an expression in this case which is to be found in the opinion of the judges, delivered by Willes J. In declaring that a letter in that case was properly rejected by the judge at the trial on the grounds of lis mota, Willes J.

(1) 7 H. L. C. 633, 641.

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said: "That was a controversy capable of being litigated, and upon which the parties interested took opposite sides. If a suit for justification of marriage (1), or for restitution of conjugal rights, had followed, the lis would surely have dated at least from the time when the parties had respectively assumed a hostile attitude; and by the law of England, differing in this respect from the civil law, a suit is not necessary to constitute lis." The learned judge certainly seems to suggest here that one test of a lis is whether the controversy is capable of being litigated, but I am by no means sure that he therefore means to say that no lis is possible unless the question in dispute is capable of litigation. The Lord Chancellor, Lord Campbell, in delivering the first speech in the House, does not give any colour to the suggestion that litigation or capability of litigation is the decisive test of the meaning of the word lis. He seems throughout his speech to rest his view upon the point as to whether a controversy had arisen which was likely to create a bias one way or the other upon the mind of the members of the family. Counsel for the Attorney-General also received some reinforcement from Wightman J. in the case of *Shedden* v. *Patrick*. (2) Wightman J. there makes use of this expression: " .... but the cases decided since establish that there must be not merely the existence of facts which may lead to a suit, but an actual controversy." On the other hand, the judgments of the other judges in this case make no special reference to a dispute capable of being litigated, and appear to take the same view of the question which weighed with Lord Campbell, that the essential point to determine is whether a controversy had arisen which might bias the mind of the declarants. Again I cannot help thinking that the wider view is the better view, and that there is neither reason nor authority for limiting the meaning of the word " lis " in the way contended for by the Attorney-General.

(1) *Note.*—In the course of the case Langton J. stated that there was an apparent slip in what Willes J. was reported to have said, which should be read " if a plea of justification to a suit of jactitation of marriage " and not " if a suit for justification of marriage " as in the text of the report.

(2) 2 Sw. & Tr. 170, 188.

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The final point, upon which I must admit I have far greater doubt, arises upon the application of this ante item motam rule to a special declaration of Edward Chatham. This declaration was made in the year 1918 to a clerk in his employ, and consisted of a full statement of the whole history of the petitioner in connection with Chatham and his wife. It amounted to a complete denial of paternity on the part of Chatham, and a clear statement that the petitioner was his wife's child born before he met her. The declaration was said to have been evoked by a threat on the part of the petitioner's wife to attempt to compel Chatham to acknowledge the petitioner as his son. Counsel for the petitioner claimed that this declaration must be ruled out of evidence, being post litem motam, since it could not possibly be said to fall within either Lord Eldon's well known expression: "the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth": *Whitelocke* v. *Baker* (1), or to stand the test, that has so frequently been enunciated, of a declaration made when the mind stood even without bias. I must admit that the more one reflects upon the opinions of the judges in such cases as the *Berkeley Peerage Case* (2) and *Butler* v. *Mountgarret* (3), the more difficult it becomes to see how this declaration can be said to fall within the terms of the rule. It could, however, be urged on behalf of its admissibility that there was no evidence of any existing controversy in the family at the moment when this statement was made, and indeed until Chatham made this denial, it was always possible that no controversy would arise. On the whole I think that this declaration ought to be admitted, even if it be necessary to make an exception upon an exception and to say that although it may not fall within the general ambit of the exception, since the declarant could hardly be free from bias, it is a matter of natural justice to allow a dead man, whose reputation has been seriously impugned, to be heard in his own defence. I have accordingly approached

(1) 13 Ves. 511, 514. (2) 4 Camp. 401, 417.
(3) 7 H. L. C. 633.

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this case upon the footing that all the evidence of doubtful admissibility adduced before me should be regarded as admissible. There were certain minor matters which I ruled definitely as inadmissible when offered in evidence in the course of the case, and I have seen no reason to alter my view upon these points.

Turning now to the facts and evidence in the case, it is not surprising that the considerable body of evidence adduced on behalf of the petitioner varied very greatly in weight and value. The petitioner himself appears to have followed several avocations of varying character, and at present describes himself as a commercial traveller. He was not, as I judged, a man of any very high degree of instruction, but although rough in manner he made the impression upon me of a reasonably straightforward person. His evidence was not highly coloured or obviously exaggerated, and although his story was an unusual one, it was neither fantastic nor incredible. In the circumstances, and having regard to the fact that he stood to gain considerably by making good his claim in these proceedings, his evidence had, of course, to be received with considerable reserve. Counsel for the other parties rightly laid stress upon the weakest point in the case of the petitioner —namely, that although upon his own showing he had lived for a number of years upon excellent terms with Mr. Chatham, he never made any direct effort to obtain from Mr. Chatham the recognition which was his due. Stated shortly, the petitioner's story was that he remembered his baptism at the age of five in company with two other children, Florence Jane and Charles Davy, who were the children of his grandfather Robert Joseph Davy and his second wife Annie McGrath. He remembered living with Chatham and his mother Mary Davy, and at the age of about sixteen running away from his home with them because Chatham had given him a good hiding for failing to obtain first place in an examination. He recounted several family incidents, and then described in some detail an interview which took place, after he had run away from home, at the house where he had taken refuge with his uncle Thomas Davy and his aunt Mrs. Thomas Davy, now Mrs. Dinah Mobley.

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At this interview he learned for the first time that he was not, as he had imagined, the son of his grandfather Robert Joseph Davy and Annie McGrath but was the son of Mrs. Chatham and the unacknowledged natural son of Chatham. A subsequent interview with his uncle Thomas and his aunt Dinah gave him the whole details of the story, which he thereafter accepted as the true version of his birth. He continued, however, to live with his uncle and aunt for some time and never returned to the roof of Chatham. After two years of estrangement, the quarrel between the petitioner and Chatham was composed, and the petitioner gave evidence as to good relations between himself and his parents, and to calling them respectively "Mother" and "Pa." The significance which might attach to this latter method of address was very much diminished by subsequent evidence that Mr. Chatham, in his later years, was familiarly addressed as "Pa" by a number of people, including a clerk in his office named Tom Dixon, who was no relation whatever of Mr. Chatham. The petitioner's answer to the very natural question put to him by counsel for the respondents as to why he never claimed from Mr. Chatham that he should acknowledge him as his son was that at different times, and especially at the time of the petitioner's marriage, he had believed that Mr. Chatham was on the point of making this recognition and that, when he failed to come up to expectation, the petitioner was too much hurt and angry to ask him to do so. This evidence, not in my view particularly strong standing by itself, received forceful corroboration from Mrs. Mobley. This elderly lady, who had married Thomas Hugh Davy in the year 1886, was in my judgment very much the best witness who gave evidence in these proceedings. She was very alert, very clear, and quite unshaken as to the events of which she gave testimony. She gave an even clearer and better account than the petitioner of the interview between her husband and Mr. Chatham, which took place in her presence and in her house, after the petitioner had run away from the house of Mr. Chatham. She described most convincingly, and without unnecessary detail, how her husband had threatened to publish

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the fact that Mr. Chatham was the boy's natural father, if Mr. Chatham would not leave the boy alone, and narrated much better than the petitioner had done how her husband and herself had explained to the boy later that Mr. Chatham was his father.

Furthermore, she strongly corroborated the evidence of the petitioner as to an offer by Mr. Chatham to give him 100*l.* if he would return home. This offer, though far from being conclusive, is not in my judgment without significance. In other circumstances it might well be said that no special significance should attach to the holding out of such an inducement to a wayward lad who had been harshly treated. It could be attributed to a not unnatural remorse on the part of a just man who felt that he had acted precipitately in anger. But in the present circumstances it is exceedingly hard to reconcile with the respondent's case. If it were true that this boy, now the petitioner, was to the full knowledge of Mr. Chatham the illegitimate child of his wife by another man before marriage he would need to be something more than human not to seize somewhat eagerly any opportunity of getting rid of him, and it would seem almost wildly improbable that any man so situated would actually be prepared to pay a substantial price to coax him back. In addition to these matters, Mrs. Mobley gave very clear evidence of an even more important incident concerning the christening of the petitioner. This took place, it will be remembered, in the year 1884, and Mrs. Mobley was present at the ceremony and stood godmother to the three children who were christened together on that occasion. She would thus have every reason to recall the occasion accurately. She gave evidence to the effect that Chatham stood godfather to the petitioner, and made the observation to her: "I am standing godfather to my own child," to which she, Mrs. Mobley, answered: "There are plenty that do that." She gave further evidence that her father-in-law, Robert Davy, told her that the petitioner was the child of Edward and Mary Chatham, and explained Mr. Chatham's remark to her by saying in evidence: "He knew that I knew he was the father." Counsel for the petitioner laid great stress upon this

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incident, and indeed claimed that it was the crux of the case. He argued, and I think argued soundly, that it is difficult, if not impossible, to reconstruct this incident. Nothing is commoner in accounts of conversations of long ago than the alteration, possibly unintentional, by the narrator of one or two important words whereby the whole meaning of the conversation is completely metamorphosed. No one who heard this portion of Mrs. Mobley's evidence could, I think, take such a view of her account of the christening incident. It either took place as she recounted it, or it never took place at all. In my judgment Mrs. Mobley was a truthful and accurate witness, and I accept her evidence entirely as to this conversation at the christening of the petitioner. Moreover, apart from Mrs. Mobley's evidence, the admitted facts that Chatham stood godfather to the boy and took him to live in his house, seem to point much more in the direction of the tacit admission by Chatham that the responsibility for the boy lay at his door, rather than towards the alternative theory that Mary Chatham's father, having first concealed from Chatham that his daughter had an illegitimate son, had then succeeded in persuading Chatham to stand godfather and subsequently in making him maintain this unwanted child.

The evidence for the petitioner was reinforced, to a lesser degree, by a witness independent of the Davy and Chatham families, named Miss Nellie Kenyon. This lady was brought into contact with the petitioner and with Mr. Chatham's legitimate son Edward Alfred Chatham during the War. Miss Kenyon occupied a responsible position under the National Savings Committee during the War and made the impression upon me of a wholly reliable witness. Her evidence did not go very far, but she spoke with great conviction to interviews with Mr. Chatham in which he referred to the petitioner and his son Eddie as "my lads," and also to an occasion upon which Mr. Chatham said that he had made provision for the petitioner and his wife. The petitioner, as I have already noted, never made a direct request to Edward Chatham to acknowledge his paternity. It is agreed, however, that at some time after the petitioner's marriage his wife made a determined attempt to

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secure for her husband what she believed to be his rights, and I have little doubt that it was her move in this direction which caused an estrangement between the petitioner and Mr. Chatham in the latter's closing years. Where Mrs. Harry Davy's evidence is in conflict with Mr. Dixon upon a matter of dates I prefer Mr. Dixon's trained recollection to the untrained and biassed recollection of Mrs. Harry Davy.

The case for the respondent opened with some evidence from inhabitants of Ludlow, at or about the time when Mr. Chatham and later the Davy family were resident in that town. The evidence of these witnesses was not particularly destructive of the petitioner's case. As to the part of the case to which this evidence was addressed, namely, the whereabouts of Edward Chatham and Mary Davy at the time of the conception of the child now the petitioner, I think the evidence is too uncertain for any exact finding to be made. It is probably right, as counsel for the respondent contended, that the distance between Ludlow and Pontefract was in those days prohibitive against any frequent visits by Edward Chatham to Pontefract. Against that, however, is the undeniable fact that Mary Davy was at one period of her life in service in an hotel in Ludlow, and the records of the Davy family contained for the most part in a somewhat untidy pocket-book are much too uncertain to exclude the possibility that she was so employed before her parents came to reside in Ludlow.

The serious evidence on behalf of the respondents was given by a solicitor, Mr. Tom Dixon, who had been articled to Chatham, and subsequently employed by him as a trusted and confidential clerk. His main evidence was that in 1918 Mrs. Harry Davy had threatened to take steps to compel Chatham to acknowledge that he was the father of her husband the petitioner. This design she had imparted to himself, Mr. Dixon. Mr. Dixon had thereupon immediately acquainted his employer with Mrs. Davy's intention and Mr. Chatham, upon learning this, had told Mr. Dixon the whole story of the petitioner from his birth to that day. Mr. Dixon was a fair but somewhat disappointing witness. It was objected against him by counsel for the petitioner, that he gave his version of his long

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conversation with Mr. Edward Chatham without hesitation and almost without punctuation after a lapse of some twelve years. In view of the fact that he is the solicitor to the respondent in the present case, and therefore a most responsible agent in this litigation, I saw no reason to distrust him because he had made himself fluently familiar with the evidence which he had determined to give. I was, however, disappointed with him in cross-examination, in which he gave the unfortunate impression of being strictly on the defensive and very much concerned to defend unimportant and indefensible positions. He was not shaken, and indeed it is a little difficult to see how he could be shaken, in respect of what I call the main portion of his evidence, and I have weighed very carefully Mr. Chatham's reasoned denial and ready acceptance of the challenge upon the crucial issue. In addition to the evidence for the petitioner and the general considerations which in my judgment overbear this denial I think it falls to be remembered that by the time this challenge reached him, Mr. Chatham was in a secure and respected position. He was well equipped with funds to meet any form of attack, and had behind him a long professional experience to enable him to deal successfully with any ill-instructed and ill-directed attack. Nor had Mrs. Harry Davy at her command any cogent or compelling evidence which could cause alarm to Mr. Chatham. He could not but be well aware that there were no records outstanding against him. He was thus well fortified to meet and to repel any action which Mrs. Davy should inadvisably take against him. These latter considerations could not, of course, be allowed to weigh a feather in the balance against Mr. Chatham if one were not satisfied upon direct evidence that the charge against him is fairly and sufficiently proved. I add them only to explain how in my view his attitude upon attack, in itself consistent with complete innocence, may also be explained in conformity with the view that I have formed.

In my judgment the petitioner has discharged the onus which lay upon him of proving that Edward Chatham was his father, that Mary Davy was his mother, that they were free to marry at the time when he was born, and that they subsequently

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married. Accordingly I make the declaration prayed in his favour.

Counsel for the Attorney-General asked for an order for the costs of the Attorney-General having regard to the amount of the estate involved. He referred to the provision as to Crown costs of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 7.

No order as to costs between petitioner and respondent. Petitioner ordered to pay costs of Attorney-General.

Solicitors for the petitioner: *Stow, Preston & Lyttelton, for W. E. Hough, Runcorn.*

Solicitors for the respondent: *Mawby & Barrie, for Tom Dixon, Manchester.*

The Treasury Solicitor.

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July 10, 31.

BEVIS *v.* BEVIS.

Divorce — Evidence — Discretion Statement — Admissions — Subsequent proceedings—Evidentiary Value of Statement in subsequent proceedings.

Admissions of adultery made by a petitioner for divorce in a discretion statement filed by him in pursuance of the direction of the Court are admissions made for the guidance of the Court in exercising its discretion on the petition before it. They are not general admissions to be used in other proceedings or for other purposes. Their admission as evidence against a party upon whom it has been obligatory to make them as disclosures to the Court would be contrary to natural justice and is open to the objection that under the guise of disclosure for a special purpose facilities might be accorded to the parties for acting collusively in subsequent proceedings.

WIFE'S PETITION, dated December 20, 1933, for dissolution of marriage on the ground of the adultery of her husband.

The parties were married on November 19, 1926, and there was one child born in 1931. The charges of adultery were

in relation to prostitutes, one of whom was named in the petition. There was no defence to the petition. The petitioner asked for the exercise of the discretion of the Court in her favour, having herself committed adultery.

The question arising and calling for report was with reference to the evidence in support of the charges made in the petition. By an earlier petition dated December 9, 1932, Leslie Cubitt Bevis, the husband, had charged Margaret Beatrix Bevis, the present petitioner, with adultery with a named man. L. C. Bevis on the petition now referred to had prayed for the exercise in his favour of the discretion of the Court and had filed a statement showing the grounds of this prayer. On this petition coming on for hearing on December 12, 1933, the case was dismissed with costs; the President, by whom it was heard, finding the charge of adultery not established. In the course of his judgment the learned President indicated that even if he had been satisfied that the charge against the wife was established, the conduct of the husband in conducing to the adultery charged would have required more close inquiry.

The evidence now produced of the adultery of the husband consisted in the main, if not entirely, of his admissions of adultery in the discretion statement filed by him in connection with the earlier petition.

The nature of the case for the petitioner sufficiently appears in the judgment.

Noel Middleton for the petitioner.

Cur. adv. vult.

July 31. LANGTON J. [having stated the facts, proceeded as follows:] The case has a previous history. In the year 1932 Mr. Bevis petitioned in this Court for a divorce from his wife on the ground of her adultery with a man named Rogers. The issue of her adultery with Rogers was tried before the President in 1933, when that issue was decided in Mrs. Bevis' favour and the case was dismissed with costs against the husband. I understand from counsel (and I

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am quite sure the statement is made accurately) that the President on that occasion observed that if there had been any adultery, he could hardly imagine a case in which the husband had conduced more to the wife's adultery than he had in that case; and such a statement coming from the President has the greatest possible weight. Indeed the history of the married relations which the wife has detailed to me has confirmed the view which the President formed, and I have very little doubt that in this case the husband did conduce to the adultery to which the petitioner is obliged to confess. For that reason, and for other reasons, I should not have hesitated to exercise my discretion in favour of Mrs. Bevis, if I had been satisfied that adultery had been committed by Mr. Bevis, but the evidence of his adultery stands in a somewhat singular fashion. There is no direct evidence upon which the Court is asked to act. The evidence upon which it is sought to prove adultery consists in the main, if not totally, of admissions of Mr. Bevis, and the principal of those admissions are admissions contained in the statement which he filed in the original suit asking for the exercise in his favour of the discretion of the Court.

The case, therefore, raises the question of what is the evidentiary value of statements of this character, and of so-called admissions contained in statements of this character. Now the history of these discretion statements (as they are called for the purpose of brevity) is a quite recent one. It has long been the practice in this Court that parties asking for the exercise of the discretion of the Court are bound to set forth that fact in their petition, but it was not, I think, until the comparatively recent case of *Apted* v. *Apted and Bliss* (1) that Lord Merrivale laid down the procedure which is now invariably followed. In that case, after an extensive review of the whole question of the discretion of the Court, he laid it down that petitioners in these circumstances should file with the petition a detailed statement of the material facts upon which the Court is asked to exercise its discretion and the grounds upon which the petitioner relies, and since

(1) [1930] P. 246.

that time this practice has been followed. It is not for me to discuss the value of that practice, but speaking as a judge of now some years' experience, I may say that I personally think, and have found that practice to be useful and salutary. But I do not think any one can have imagined, and I feel certain Lord Merrivale did not imagine when he laid down this practice, that the admissions contained in the discretion statement should, or could, be employed as admissions in another cause. It is a somewhat singular inversion of the Court's intention that facts which are put before the Court for one purpose in one case should be used in another case for a totally different purpose. No one, I think, has questioned, and I dare say no one will question, the Court's right to lay down for its own purposes the procedure by which it will be guided; but it is to be observed that petitioners in these circumstances are called upon to make for the purposes of the guidance of the Court a much more detailed statement than they would, perhaps, ever have made voluntarily. To my mind, when statements of that character are made obligatory by the Court, the Court should see that any matters of fact therein contained, or statements therein made, should not be used against the party making them outside the proceedings for which they were specifically made. It seems to me that it is against all ideas of natural justice that, because a man is obliged, by the Court, in his pursuit of one object, to make certain admissions, those admissions should be considered to be admissions before all the world and to all the world, and should be used to his detriment in other proceedings. To my mind the admissions made in these statements for the purposes of securing the exercise of the discretion of the Court, made as they are at the instance of the Court for the Court's guidance, and upon the authority of the Court, are admissions for those purposes only, that is to say, for the purpose of those proceedings only. It is not, I think, a principle foreign to our law that an admission made by a party in a case for the purpose of that case only, is an admission not to be binding upon him, in other proceedings or elsewhere. We have a very familiar illustration of the principle in

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this Court in the other branch of its jurisdiction in salvage cases, where values are frequently admitted for the purposes of the case only, and any admission so made is not binding against the party making it in his business relations with the other parties, nor, although adopted by the Court in its findings of fact, is it in any sense binding upon people who are adjusting the several claims of the parties in places other than this Court. To my mind that is the real ambit of these admissions, they are admissions for the purpose of current proceedings only, and they cannot be used at will outside in other proceedings against the party making them.

Another aspect of the matter which has importance and which has weighed with me is that it seems to me that if these admissions, as they are called, can be taken to be what is claimed for them here, i.e., admissions to all the world outside the special proceedings, it leaves the door wide open to collusion. It requires very little ingenuity upon the part of people who are minded to put a false case before the Court to enable them to make use of admissions of this kind quite unscrupulously. It would be perfectly simple for the parties to agree that the husband should put admissions of this character on record in a discretion statement, which may or may not be covered by his affidavit as to the truth of the petition. For my own part I am not certain that it is so covered. The suit in which these admissions were made would then no doubt be allowed to lapse, and the wife would come forward to say: "I have got these admissions from my husband in a statement of facts made by him in a previous proceeding," and thus the Court would have no opportunity whatever of testing or knowing what the real evidence was upon which the petition of the wife was launched. Therefore, I think on that ground also that it would be most impolitic and against the real course of justice to allow an admission of this kind to be used in the way that it is desired. I do not for a moment pretend to say that admissions of this kind are not of a very solemn character. They are matters which no doubt could most fairly be brought up in any other proceedings by way of cross-examination of any party who

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had made them, but that is not what I am concerned with to-day. I am concerned with a case in which they form the main, if not the only real, evidence of adultery, and I am asked to grant a decree upon the faith of those admissions. Counsel for the petitioner pressed upon me a number of cases which were ample authority for the proposition that the Court has power to grant a decree upon no other evidence than admissions in a proper case. It is unnecessary to refer to them. I unreservedly agree. I am not unmoved also by the claim that admissions made in these circumstances are admissions against interest, and are, therefore, in every way likely to be admissions of truth. Certainly it does require some strain to imagine a case in which a man would, when asking for the discretion of the Court, represent himself to be blacker than he really was. I am not at all insensible to that aspect of the matter which counsel has presented, but I base my view in this case upon much broader matters. I think, as I say, that it is against natural justice that a man, forced as he is by the procedure of this Court to make certain disclosures, should find himself faced by those disclosures as the main, if not the only, evidence against him in other proceedings. I do not think they were intended for that purpose, and it seems to me that, if used for that purpose, they might fail somewhat in their candour in the original suit.

Now this view is one which unfortunately leaves the petitioner in the difficulty that she cannot secure a decree upon this evidence, and I shall leave it open to her, if I am asked to do so, to bring forward her petition again on further and better evidence. I think that is the best course to mark my sense of the fact that it is not because I disbelieve anything she says that I take the view that I have here expressed. I think, therefore, that the proper order is that this petition, if application is made, should stand adjourned.

The case stood adjourned for further evidence to be adduced or for dismissal with a view to an appeal.

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Noel Middleton for the petitioner stated that no further evidence could be adduced, and elected to have the petition dismissed. He asked that alimony pendente lite, for the payment of which an order had been made, should continue pending a contemplated appeal from the dismissal of the petition. This was a recognized practice unless the appeal was frivolous and vexatious. He referred to *Jones* v. *Jones* (1) and *Dunn* v. *Dunn.* (2)

LANGTON J. I do not think that an appeal can be said to be frivolous or vexatious in the circumstances of the present case. The petition will be dismissed, and the alimony will continue pending the appeal, provided notice of the appeal is given within six weeks.

Solicitor for the petitioner : *Ernest A. Kite.*

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Oct. 3, 4.

HIGGS *v.* HIGGS.

Divorce—Provision for Wife—Concurrent Jurisdiction of Divorce Division and Court of Summary Jurisdiction—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 32, 190, *sub-s.* 3—*Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *ss.* 5 (*c*), 10—*Matrimonial Causes Rules,* 1924, *r.* 57.

During the pendency of a petition for divorce in the High Court no order for maintenance should be made under the Summary Jurisdiction and Maintenance Acts, 1895 to 1925, by a Court of Summary Jurisdiction. Although the power of the High Court to order a provision for a wife is not an exclusive power, there is an obvious inconvenience in holding that there is a concurrent jurisdiction in the High Court and in justices in the matter of ordering a provision for a wife to be made by her husband if proceedings in the Divorce Division are on foot. Dicta to this effect of Lord Hewart C.J. and Avory J. in *Rex* v. *Middlesex Justices. Ex parte Bond* [1933] 1 K. B. 72 followed.

(1) (1872) L. R. 2 P. & M. 333. (2) (1888) 13 P. D. 91.

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APPEAL from a Court of Summary Jurisdiction.

The husband, George Stanley Higgs, appealed from an order made on May 21, 1934, by a metropolitan police magistrate on a summons issued by the respondent wife, Grace Josephine Higgs, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, whereby it was adjudged that the appellant had wilfully neglected to provide reasonable maintenance for the respondent, and it was ordered that the appellant should pay for the respondent the weekly sum of seventeen shillings and sixpence by way of maintenance. The ground of appeal argued was that the magistrate had no jurisdiction to make the order because a petition was pending in the High Court to dissolve the marriage of the parties.

The facts, the dates of which are given in the judgment of the learned President, were shortly these. The husband left his wife in September, 1933, on his discovery, as he alleged, that she had committed adultery. The wife thereupon took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of the wilful neglect of the husband to maintain her, which ultimately resulted in the making of the order appealed from. Pending the proceedings upon the summons the husband filed a petition in the Divorce Division of the High Court praying for the dissolution of his marriage on the ground of the adultery of the wife. The wife filed no answer to the petition.

A. L. Ungoed-Thomas for the appellant husband. In the similar case of *Craxton* v. *Craxton* (1) it was held by this Court on an appeal from justices that there could not be in law any desertion of the wife whilst a petition for dissolution of marriage was pending in this Court. In that case also the magistrate had made an order for separation and maintenance pending a petition. In *Rex* v. *Middlesex Justices. Ex parte Bond* (2) the majority of the Divisional Court in the

(1) (1907) 71 J. P. 399.

(2) [1933] 1 K. B. 72, but compare this case in the Court of Appeal [1933] 2 K. B. 1 (Reporter).

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King's Bench Division held that the jurisdiction of the justices in a matrimonial matter was ousted by the pendency of proceedings in this Court. By the Summary Jurisdiction Act, 1895, s. 10, the magistrate had a discretionary power to refuse to make an order, as the matter before him was more conveniently to be dealt with by this Court, where a petition was pending. He should have exercised that power. In that case, moreover, there could have been no appeal from his decision, and the expense of this appeal would have been avoided. The wife could have obtained alimony in this Court, and there was no occasion for proceeding for an allowance in another jurisdiction: Judicature (Consolidation) Act, 1925, s. 32; Matrimonial Causes Rules, 1924, r. 57 et seq.

The Respondent did not appear.

THE PRESIDENT (SIR BOYD MERRIMAN). This appeal raises a curious point not free from difficulty. These are the material facts: On September 22, 1933, the respondent wife is alleged to have committed an act of adultery upon which the husband on October 6, 1933, filed a petition for dissolution of marriage which is still pending. Meanwhile on September 25, 1933, the wife took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, returnable before a metropolitan police magistrate, alleging the wilful neglect of the husband to maintain her—the alleged neglect consisting of his leaving her on September 23, 1933, on his discovery of the alleged act of adultery. For various reasons considerable delay occurred in the prosecution of the petition of the husband, which has not yet been heard. On the return of the summons of the wife on October 9, 1933, the magistrate was informed of the filing of the petition, whereupon with perfect propriety he adjourned the summons sine die. The summons came on again for hearing on February 26, 1934, and on the representation that divorce proceedings were still pending was again adjourned. It was again adjourned on March 12, 1934, the magistrate being informed that the petition would come on for hearing at the next sittings of the Divorce Division on the return of the

petitioner to this country from Ireland, where he then was. On this occasion the case of *Craxton* v. *Craxton* (1) was cited to the learned magistrate as an authority to the effect that he had no jurisdiction. So far everything proceeded as might be expected. On April 23, 1934, on the adjourned summons again coming on for hearing, there was no appearance on behalf of the husband, and there was a further adjournment for one month until May 21, when there was again no appearance by the husband and the order appealed against was made. No blame whatever attaches to the solicitors for the husband, who, as appears, had failed to receive further instructions from their client.

In my opinion the magistrate should not as a matter of law have made the order, on the short ground that the petition was pending. I wish to say that the magistrate was placed in an impossible position by the failure of the husband to appear before him. The magistrate had been told that a petition had been presented as far back as October, 1933, and the absence of a decision on the petition by the following May, having regard to the ordinary time for a petition to come on for hearing, indicated failure to prosecute the petition. Moreover, there had been complete default to answer the summons, and the magistrate may well have supposed from this that the petition had ceased to be effective. I attribute the blame wholly to the husband himself for the matter being dealt with as it was, but, as I have already said, notwithstanding the conduct of the husband, the point of law remains to be decided, whether during the pendency of the petition the magistrate should have dealt with the summons. This point has given me some little difficulty, but I am satisfied that in the circumstances he should not have made this order. Directly a petition is presented in this Court, whatever the relief claimed, the Court has power by the combined effect of the Judicature (Consolidation) Act, 1925, s. 190, sub-s. 3, and the old practice of the Ecclesiastical Courts preserved by s. 32 of the same Act and the Matrimonial Causes Rules, 1924, r. 57 and following, to order alimony

(1) 71 J. P. 399.

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pendente lite to be paid. It is quite true that neither statute nor rules say that it is an exclusive power, but once the right of the wife is established to have the amount of a provision for her ascertained, it seems to me that the last sentence of the judgment of Avory J. in *Rex* v. *Middlesex Justices. Ex parte Bond* (1) applies with great force. He says: "The inconvenience of holding that there is concurrent jurisdiction in the Divorce Court and in the justices is obvious, for if the justices may make an order as in this case, there is nothing to prevent the husband going to the Divorce Court the next day and asking, possibly successfully, for a contrary order. The question might see-saw between the two Courts, producing an absolute scandal." That this is not a fanciful statement of the situation which might arise is shown by the case of *Craxton* v. *Craxton*. (2) To my mind, however, that case is not itself conclusive of the point arising here. In that case, although a petition was pending, and in particular an order had been made for alimony, the magistrate dealt with a summons for desertion and ordered a sum for maintenance larger than that ordered by this Court. The real answer to the summons was that it was impossible to hold that there was desertion whilst the petition was pending at the same time, but it is evident that the Court thought it would be wrong to allow the double remedy to operate, and took the same view on this point as Avory J. in *Rex* v. *Middlesex Justices. Ex parte Bond*. (1) The wife, so long as the petition is pending, has her rights in case there is undue delay in its prosecution. She has such remedies as the Rules provide for expediting the petition or dismissing it for want of prosecution. In the latter event the powers of a court of summary jurisdiction to order maintenance would revive, but on the broad grounds laid down by Avory J., with whom I entirely agree, the court of summary jurisdiction ought not to deal with any question of maintenance at the instance of the wife while a petition in this Court is pending. The appeal must be allowed but without costs, as I think that the magistrate was induced to act against his inclination and in ignorance, brought about

(1) [1933] 1 K. B. 72, 80. (2) 71 J. P. 399.

by the conduct of the appellant, of the fact that the petition was still pending.

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LANGTON J. I agree. The position is admirably crystallized in the passage from the judgment of Avory J. in *Rex* v. *Middlesex Justices. Ex parte Bond* (1), which my Lord has read. There I am content to leave the point argued. The difficulty in the case has arisen from the way in which the appellant has handled it. I have every sympathy with the learned magistrate. For my part I have little doubt that the magistrate thought that there had not been bona fides on the part of the appellant. He doubted whether the petition was still in existence, and thought with his customary good sense that he had better deal with the facts as they were known to him. Nevertheless this Court must see the facts as they are. The petition seems perfectly bona fide and remains on the file. We must, therefore, consider whether the law as laid down by Avory J. applies. I entirely agree with what the President has said.

Appeal allowed, without costs.

Solicitors : *Raymond Oliver & Co.*

R. M. M.

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Oct. 26.

Divorce—Practice—Petition for divorce—Cross-prayer for divorce in Answer—Want of prosecution of petition—Former Practice—Stay on Petition—Matrimonial Causes Act, 1866 (29 & 30 *Vict. c.* 32), *s.* 2 —*Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 180.

Following, and as a consequence of, the decision of the Court of Appeal in *Sandler* v. *Sandler* (*Davies and Johnstone Co-respondents*) [1934] P. 149, in cases where there is want of prosecution of the petition and the answer opposes the relief sought by the petitioner by alleging countercharges and claiming cross-relief, the future practice will be as follows : A stay will be placed upon the petition, thus keeping alive its framework, which will enable the respondent to proceed to trial on the prayer of the answer with any consequential relief to which he or she may be entitled.

(1) [1933] 1 K. B. 72, 80.

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VOLKERS v. VOLKERS (WINGATE CITED).

PETITION for dissolution of marriage. Relief claimed by the respondent.

On September 8, 1933, the wife, Franciska Josephine Volkers, filed her petition for dissolution of marriage charging the husband, Gilbert Francis Wood Volkers, with adultery. The respondent by his answer dated October 31, 1933, pleaded condonation by the wife of his adultery, countercharged the wife with adultery with George Wingate, the party cited, and prayed for the exercise of the discretion of the Court in his favour and a decree of dissolution at his instance. The wife failed to prosecute her petition, and registrar's orders were made on May 8, 1934, that the prayer of the petition claiming dissolution of the marriage should be struck out, and on May 10, 1934, that the answer of the respondent should stand.

[Having regard to the decision in *Sandler* v. *Sandler* (1) the President (Sir Boyd Merriman) heard argument on the state of the pleadings before proceeding to hear the merits.]

[THE PRESIDENT (after reading from the judgment of Lord Hanworth M.R. in *Sandler* v. *Sandler* (1)): The decision of the Court of Appeal is, on the face of it, an authority only that a supplemental petition is part of an original petition and they stand or fall together, but the important consequence seems to arise that on the same reasoning a cross-claim in an answer is a fortiori part of the proceedings under the petition and would fall to be dismissed along with the petition. The registrar's order of May 8 striking out the prayer of the petition in effect dismisses it.]

R. H. Bayford for the respondent. The Matrimonial Causes Act, 1866, s. 2, practically puts a respondent who makes countercharges in the position of a cross petitioner. The Judicature (Consolidation) Act, 1925, s. 180, practically re-enacts the former section. The case of *Schira* v. *Schira and Sampajo* (2), which was decided after the earlier statute had been passed, does not touch the plain effect of it. On the

(1) [1934] P. 149, 155. (2) (1868) L. R. 1 P. & M. 466.

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contrary it lays down that whatever happens to the charges in the petition the cross-claim remains alive. No order that has the effect of dismissing the petition for want of prosecution can divest the respondent of the rights the statutes have given him. In *Blackborne* v. *Blackborne* (1) the Judge Ordinary said: "If the petitioner chooses to abandon his prayer, that is no reason why the respondent should not be allowed to proceed and prove her answer, and substantiate her claim to the decree for which she prays." If the Court is of opinion that the answer must share the fate of the petition I ask for leave to appeal from the order of the registrar so that it may be varied by striking out the dismissal of the prayer of the petition and substituting a stay of the petition so as to keep the petition alive to permit of my proceeding on my answer.

G. C. Tyndale for the party cited.

The petitioner did not appear.

THE PRESIDENT. This case raises a preliminary point of considerable importance in practice. For this reason I have required argument.

[The President then proceeded to recapitulate the proceedings taken in the suit and continued:] The reason why the prayer of the petition was struck out is this. By the Judicature (Consolidation) Act, 1925, s. 180, if in any proceedings the respondent makes cross-charges the "court may give to the respondent the same relief" in respect of those cross-charges as if a separate petition had been filed, thus reproducing the effect of the earlier Matrimonial Causes Act, 1866, s. 2. For many years, if the petitioner has been in default in prosecuting the suit, it has been the practice to give effect to that section, or the corresponding section in the earlier statute, by merely striking out the prayer of the petition, leaving its framework, and thus allowing the respondent to proceed with the suit and claim such relief as he or she may have been entitled to. Till recently no doubt

(1) (1868) L. R. 1 P. & M. 563, 564.

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had arisen of the propriety of that practice. However, in the present year a case (*Sandler* v. *Sandler* (1)) came before the Court of Appeal in which this Court had granted relief on a supplemental petition after dismissing the prayer of the original petition on the ground of collusion. The Court of Appeal held the finding of collusion to be justified. The Master of the Rolls, giving judgment in that case, said: "The question then arises what was the effect of the collusion upon the petition and supplemental petition. It is clear that the President endeavoured to avoid circuity of proceedings and expense, and, in order to do so, merely dismissed the prayer of the petition and gave the petitioner relief on the supplemental petition. But if the prayer of the petition is dismissed the whole petition must be dismissed. Part of the petition cannot be dealt with separately in that way. It was, however, said that the supplemental petition still stood, proprio vigore, and gave the right to the relief asked for by the petitioner. There is no ground for such a contention. The supplemental petition cannot be severed from the petition." In this Court I was tempted to apply to the very peculiar circumstances of that case the practice which had prevailed of keeping alive the framework of the suit so that the prayer of the answer could be dealt with, but the Court of Appeal said that the practice of keeping alive the framework of the petition is wrong if the prayer of the petition is not to be proceeded with. What I am now concerned about, though the practice now in question was not the actual subject of debate in the Court of Appeal, is the question whether the same reasoning is to be applied to a cross-claim for relief as to a supplemental petition, and whether the framework of this petition in the present case can be kept alive for the purpose of granting relief other than that claimed by it.

Counsel has given me all possible help. He submits that the practice as laid down by the Court of Appeal does not affect this class of case, and he relies upon the Judicature (Consolidation) Act, 1925, s. 180. My difficulty in following that argument lies in the fact that s. 180 with immaterial

(1) [1934] P. 149, 155.

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alterations merely reproduces the Act of 1866, s. 2, almost immediately after the passing of which there were two decisions of this Court which seem to tend in the opposite direction. Although the section of the Act of 1866 is not specifically referred to in either case it is impossible to hold that neither of those decisions related to a then recent statute, or that the learned Judge Ordinary (Lord Penzance) and experienced counsel were not aware of it.

These two decisions are *Schira* v. *Schira and Sampajo* (1) and *Blackborne* v. *Blackborne*. (2) That these cases are by no means out of date appears from the fact that they may be said to furnish the foundation for the judgment of the Master of the Rolls in *Sandler* v. *Sandler*. (3) In *Schira* v. *Schira* (1), which was cited in *Sandler* v. *Sandler* (3), the petitioner was met by a countercharge and a claim for cross-relief. He moved for leave to dismiss his petition, and the Judge Ordinary (Lord Penzance) held that it must be kept alive to enable the respondent to enforce orders in the suit and obtain the relief she claimed. The case of *Blackborne* v. *Blackborne* (2) is even more instructive. There again the petitioner tried to withdraw and so prevent the jury from being sworn. The Judge Ordinary said he was not at liberty to do so and that the cause must proceed, and it is quite clear from his judgment that he was proceeding under the statute of 1866. "It frequently happens," he said, "that a suit is brought before the Court in such a form that both parties—the petitioner and the respondent—can make their respective claims for a decree in the petition and the answer. If the petitioner chooses to abandon his prayer, that is no reason why the respondent should not be allowed to proceed." No positive direction is given, but it is implied in what he said that in such a case it is not the proper course that the petition should be dismissed. The actual decision in *Sandler* v. *Sandler* (3) is not directly in point, but following not only the actual decision but the essence of the judgment of the Master of the Rolls, I am bound to hold that in making this

(1) L. R. 1 P. & M. 466. (2) L. R. 1 P. & M. 563, 564.
(3) [1934] P. 149, 155.

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order striking out the prayer of the petition, the registrar has in effect dismissed the petition, though he did not intend to do so. In order to give effect to his intention in making this order, made at a time when the officials of the Registry could not be aware of the judgment given in *Sandler* v. *Sandler* (1), I allow the respondent an extension of time for appealing from the order, and I vary it accordingly by substituting a stay of proceedings on the petition itself, so that the petition may remain alive for the purpose of dealing with the charges in the answer, which I shall now proceed to do.

It should be known by all concerned that in future the proper order, in cases where the respondent has a cross-prayer which it is intended to pursue and the petitioner has decided not to prosecute the suit, is to stay the proceedings on the petition but not to dismiss it. In substance the result in such circumstances will be that the petitioner will not be allowed to proceed on his petition except by leave, and when the matter is brought before the Court the petition and the cross-prayer can be determined together by the judge at the trial of the suit.

[The hearing proceeded, and the judge pronounced a decree on the answer in favour of the respondent in the exercise of the discretion of the Court.]

Solicitors for the husband: *J. D. Langton & Passmore.*

Solicitors for the party cited: *Howe & Rake, for G. E. Jannings, Darlington.*

R. M. M.

NOTE.—The following is a copy of the order drawn up.

The President, having upon the application of counsel for the respondent extended the respondent's time for appeal from the registrar's order herein dated the 8th day of May, 1934, and having ordered that the said order be varied by a direction that the petitioner be stayed from proceeding further with her petition without leave of the Court and that the prayer of the said petition be not struck out, and the petitioner not being represented or proceeding with her petition at the hearing or defending the charges of adultery contained in the respondent's answer, and the party cited appearing by counsel but not otherwise defending at the hearing the charges of adultery

(1) [1934] P. 149, 155.

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contained in the respondent's answer, and having taken the oral evidence of the respondent and of the witness produced on his behalf in support of the answer filed herein pronounced that the respondent has sufficiently proved the contents of the said answer and in the exercise of the discretion decreed that the marriage be dissolved by reason that since the celebration thereof the petitioner has been guilty of adultery with George Wingate, the party cited, unless sufficient cause be shown to the Court why the decree should not be made absolute within six months from the making thereof and condemned the party cited in the costs incurred and to be incurred on behalf of the respondent in this cause.

RUSSELL W. D. (COUNTESS RUSSELL) *v.* RUSSELL B. A. (EARL RUSSELL).

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July 21, 25, 26;
Nov. 15, 16, 22.

Divorce—Deed of Separation—Mutual Covenant against pleading alleging or giving evidence of Matrimonial Offences antecedent to Deed—Estoppel inter Partes—Adultery of Petitioner antecedent to Deed—Discretion of Court to grant Decree to Petitioner—Discretion Statement—Prayer for exercise of discretion—Disclosure to Court of adultery of Petitioner and circumstances of married life, calling for exercise of discretion in spite of estoppel—Notice to Respondent of intention of Petitioner to file discretion statement—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178; *s.* 181, *sub-s.* 1; *s.* 198.

A covenant in a Deed of Separation in the form in *Rose* v. *Rose* (1882) 7 P. D. 225, that no matrimonial offence before the deed or act of either party in relation thereto shall be pleaded, alleged or admissible in evidence, does not absolve a petitioner in subsequent proceedings, who has committed adultery before the deed, from the duty of making full disclosure to the Court of the circumstances in which he or she asks to have exercised in his or her favour the discretionary power of the Court to grant or withhold a decree.

Although it is now established law that inter partes a covenant to condone and refrain from recrimination is not only not against public policy but positively beneficial, it is equally clear that no bargain of the sort can bind the Court or limit the scope of its discretion. Parties can contract themselves out of their rights, but it is not competent for them to contract the Court out of its duty.

Semble, for these reasons a petitioner who seeks the exercise

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in his or her favour of the discretion of the Court to grant a decree nisi of dissolution of marriage is notwithstanding the existence of a covenant of the kind in question bound to include in the petition a prayer for the exercise of the discretion and to file the usual discretion statement, and to give notice to the other spouse of any allegation of conduct on his or her part, not referred to in the pleadings, which the petitioner is making by way of excuse for his or her own adultery.

WIFE'S PETITION for divorce on the ground of the adultery of the husband.

The parties were married on September 27, 1921, and there were two children of the marriage born November 16, 1921, and December 29, 1923, respectively. On December 31, 1932, by a deed of separation between the parties, it was covenanted (inter alia) as follows—namely, "No proceedings shall be commenced or prosecuted by or on behalf of either of them the husband or the wife in respect of any cause of complaint which now exists or has arisen before the date of these presents and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed or permitted before the execution of these presents and no act deed neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence." The deed in addition to reciting the births of the two children of the marriage contained a further recital that since the marriage, namely in 1930 and 1932 respectively, the wife gave birth to two other children by a man, who was named, other than the husband. The wife filed her present petition dated March 15, 1924, alleging the adultery of the husband since the beginning of 1933 and down to the date of the petition. There was no averment in the petition that the petitioner had committed adultery and no prayer that the Court should exercise its discretion and that it should grant her a decree in spite of adultery committed by her. No statement was filed pursuant to Direction 19 (May 29,

1930), following *Apted* v. *Apted & Bliss* (1), setting forth the facts requiring the exercise of the discretion of the Court and the ground upon which the discretion was prayed. There was no answer to the petition. At the hearing the adultery of the husband since the date of the deed was established. It was opened to the Court that the petitioner had committed adultery before the date of the deed with two men who were named and that the respondent was aware of the fact. The petitioner identified the deed of separation.

Bayford K.C., *R. M. Middleton* and *H. E. Salt* for the petitioner. The petitioner is debarred by the deed from putting before the Court evidence of any matrimonial offence committed by the respondent before the date of the deed and consequently any statement filed under the direction would be merely one-sided and inefficacious for the exercise of the discretion of the Court. It is in the public interest that parties should be able to condone adultery by deed. The petition contains no prayer for the exercise by the Court of its discretion to grant the petitioner a decree in spite of her adultery because it is impracticable to place before the Court the conduct of the respondent antecedent to the deed, however relevant such conduct may be to the question whether the adultery of the petitioner has been condoned and whether the discretion of the Court should be exercised. There is no statute or rule of Court that renders obligatory the filing of a discretion statement. The practice depends solely on a direction given by this Court which it can depart from in such a case as the present. If collusion is suggested it must be established dehors the deed.

The following cases were referred to: *Rose* v. *Rose* (2); *Rowley* v. *Rowley* (3); *L.* v. *L.* (4), and *Heath* v. *Heath & Frost.* (5)

[THE PRESIDENT (SIR BOYD MERRIMAN). This case seems

(1) [1930] P. 246, 262.
(2) 7 P. D. 225; (1883) 8 P. D. 98.
(3) (1866) L. R. 1 H. L. Sc. 63; (1864) 3 Sw. & Tr. 338.
(4) [1931] P. 63.
(5) Unreported. See comment on this case in the judgment, p. 52 post.

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to raise a point which cuts at the duty of the Court under the Judicature (Consolidation) Act, 1925, s. 178. (1)]

[At the conclusion of the argument the President intimated that he desired to have the assistance of the King's Proctor pursuant to the Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1, and further hearing of the case was adjourned accordingly.]

1934. Nov. 15. *Sir T. Inskip A.-G.* and *Clifford Mortimer* for the King's Proctor. The question in this case turns on the concluding words of the covenant in the deed of separation—namely: "In case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed or permitted before the execution of these presents and no act deed neglect or default of either party in relation to such offence or misconduct shall be pleaded or alleged by either party or be admissible

(1) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178: (1.) On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any countercharge which is made against the petitioner.

(2.) If on the evidence the court is not satisfied that the alleged adultery has been committed or find that the petitioner has during the marriage been accessory to or has connived at or condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall dismiss the petition.

(3.) If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce:

Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court he has been guilty—

(*a*) of unreasonable delay in presenting or prosecuting the petition; or

(*b*) of cruelty towards the other party to the marriage; or

(*c*) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or

(*d*) of such wilful neglect or misconduct as has conduced to the adultery.

in evidence." These words may support a contractual right inter partes to have matrimonial offences before the deed condoned and either party restrained from suing in respect of such offences. But the authorities do not warrant more than that or sanction a practice which would restrict or negative the duty of the Court to inquire into material facts under the Judicature (Consolidation) Act, 1925, s. 178. The Court cannot be forced to shut its eyes or abandon its duty to inquire whether the petitioner is estopped from claiming relief by her conduct before the deed. The condonation effected by the deed may be in fact collusive. The position is illustrated by the difference between the respective forms of covenant in *Rose* v. *Rose* (1) (of which the covenant in this case is a copy) and that in *Gooch* v. *Gooch* (2), which latter merely restrains the parties from setting up already existing matrimonial offences. In *Hyman* v. *Hyman* (3) Lord Hanworth M.R. said: "The Court is charged under the original Acts, and the Consolidation Act, to be satisfied in divorce suits that the case has been proved, that there has not been connivance or collusion for the purpose of obtaining a divorce 'contrary to the justice of the case,' that there has not been condonation, and that its interference is justified." He cited with approval a dictum of Lord Cozens-Hardy M.R. in *Harriman* v. *Harriman* (4): "The jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied." In the same case (*Hyman* v. *Hyman* (3)) Scrutton L.J. said: "The Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage.

(1) 7 P. D. 225.

(2) [1893] P. 99, 100. The covenant in *Gooch* v. *Gooch* (p. 100) was as follows: No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists, or which has arisen before the date of these presents.

(3) [1929] P. 1, 28, 30.

(4) [1909] P. 123, 131.

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The Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties ; nor does it readily act on uncorroborated confessions. . . . . Many agreements between husband and wife will not be recognized as being contrary to public policy. An agreement to separate in three years' time ; an agreement not to take divorce proceedings for future adultery, will not be enforced or recognized by the Court. Collusive or condoned adultery will not be a foundation for a petition for divorce. The alteration of the status of marriage involves considerations far beyond the private agreement of the parties." In the same case in the House of Lords (1) Lord Hailsham L.C. gives his opinion that a covenant not to invoke the jurisdiction of the Court to order permanent maintenance in a suit for dissolution of marriage is not a bar to such an application being made. Lord Buckmaster contrasting divorce with judicial separation there said : " It is, in my opinion, associated with and inseparable from the power to grant this change of status [divorce] that the Courts have authority to decree maintenance for the wife. And in the exercise of this authority they are in no way bound by the contracts made between the parties." In *Harriman* v. *Harriman* (2) Fletcher Moulton L.J. said : " By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the Court being satisfied on the evidence that the case of the petitioner has been proved. ' Proved ' here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them."

In *L.* v. *L.* (3) Lord Merrivale in substance dealt with the question now arising on the footing of decisions only covering the first part of the covenant. It reduces the exercise of the discretion of the Court to an absurdity to allow parties to demand a decree by suppressing evidence which must tend to make the Court refuse to exercise that discretion. The

(1) [1929] A. C. 601, 613, 625. (2) [1909] P. 123, 142.
(3) [1931] P. 63, 72.

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petitioner would base the non-disclosure of material facts on the fact that he or she had agreed with the respondent that no such evidence should be given. The King's Proctor strongly submits that no difficulties in carrying out the present practice in discretion cases should result in its withdrawal.

Bayford K.C. for the petitioner. The covenant does not purport to affect the duty of the Court under the statute, it merely prevents the party from giving evidence. That proposition is amply supported by the judgment of Lord Merrivale P. in *L.* v. *L.* (1) There is no statutory duty of the party to give evidence. The Judicature (Consolidation) Act, 1925, s. 198 (2), is to the opposite effect. Apart from collusion or connivance it is desirable that marital arrangements to refrain from litigation should be upheld. The Court may inquire whether collusion is present but the parties are not bound to give evidence to show collusion. Even supposing that there has been connivance and that the adultery of the guilty party may have continued since the connivance, the Court is not debarred from inquiring into the matter although the parties may not be compellable witnesses by reason of their covenant. If the Court has doubts as to the bona fides of the parties, the proper course is a reference to the King's Proctor, not to go behind the deed.

[THE PRESIDENT (SIR BOYD MERRIMAN) intimated that the necessary materials for the exercise of its discretion were not at present before the Court.]

If the usual practice as to filing a discretion statement and giving evidence of matters before the date of the deed is insisted on, we apply for an adjournment to enable the

(1) [1931] P. 63, 72.

(2) Judicature (Consolidation) Act, 1925, s. 198: The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

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petitioner to give the respondent notice of her intention to proceed in spite of the covenant in the deed.

Mortimer in reply. The King's Proctor does not admit that the course followed in *Heath* v. *Heath* (1) is a matter of right. In *L.* v. *L.* (2) the wife had no occasion to ask for the discretion of the Court. The husband endeavoured to invoke public policy as against the covenant by which he was bound.

[He also referred to *Phillips* v. *Phillips*. (3)]

[The case stood over to admit the petitioner to file a discretion statement and amend the petition by adding a prayer for the exercise of the discretion.]

Nov. 22. Counsel for the petitioner informed the Court that the respondent had been served with notice of the intention of the petitioner to pray for the exercise of the discretion and with a copy of a discretion statement which she proposed to file, giving the history of the parties, calling for the exercise of the discretion. The respondent had given notice that he would take no part in the proceedings. The Court gave formal leave to amend the prayer of the petition and file the statement. The petitioner was recalled and gave evidence on the lines of her statement which was taken as filed. The material effect of such evidence is stated at the close of the judgment.

THE PRESIDENT (SIR BOYD MERRIMAN). This is the wife's petition for divorce on the ground of her husband's adultery. The petition contains no prayer for the exercise of the discretion of the Court. The Registrar's certificate was obtained on the basis that it was an ordinary undefended case, and the suit appeared accordingly in the undefended list.

In opening the petition counsel for the petitioner called attention to the absence of any prayer for the discretion. He stated that the omission was deliberate, and was justified by the existence of a deed of separation containing a clause in the form approved in *Rose* v. *Rose*. (4) The clause is in

(1) Unreported, p. 41, ante and p. 52, post.
(2) [1931] P. 63, 72.
(3) [1917] P. 90.
(4) 7 P. D. 225; 8 P. D. 98.

the following words, and is in fact identical with the clause in that case: "No proceedings shall be commenced or prosecuted by or on behalf of either of them the husband or the wife in respect of any cause of complaint which now exists or has arisen before the date of these presents and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed or permitted before the execution of these presents and no act deed neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence."

Counsel added, however, that the deed of separation itself showed that the petitioner had been guilty of adultery, and stated that his client was praying for the discretion of the Court notwithstanding the failure to follow the prescribed procedure, which he submitted was not obligatory and had no sanction in the statute or rules. The Court would be asked to exercise its discretion upon such facts as could be stated by the petitioner consistently with her covenant in the deed of separation; but this, he argued, prevented the wife from informing the Court of any matrimonial history anterior to the deed, implicating the husband, however relevant it might be to the issue. It is true that there is no provision in any statute or rule of Court as to the procedure to be followed in a suit in which the petitioner is compelled to invoke the discretion of the Court; but since the case of *Apted* v. *Apted & Bliss* (1) it has been the practice to require that the petition shall contain a prayer to this effect, and that a statement setting forth the facts which require the exercise of the discretion and the grounds upon which such discretion is prayed, usually referred to as the Discretion Statement, shall be lodged. (2) This practice has been approved by the Court

(1) [1930] P. 246.

(2) Direction 19, Rayden on Divorce (3rd ed.), p. 588.

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of Appeal in *Cullen* v. *Cullen*. (1) I am satisfied that the practice is beneficial and that, with proper safeguards against abuse, it is of great assistance to petitioners. It has long been established that the utmost candour is necessary on the part of a petitioner who is invoking the discretion of the Court. No one is obliged to petition for divorce. By so doing a petitioner is assumed to volunteer the disclosure of his own adultery. No infringement of the Judicature (Consolidation) Act, 1925, s. 198, is involved in requiring him to give evidence of it. Indeed it is difficult, in view of the same Act, s. 178, to see how otherwise anything which could be fairly regarded as discretion could be exercised. A petitioner, particularly if he is nervous in the unfamiliar surroundings of a Court, may, without any intention of deceiving the judge, forget to give evidence of some material particular of his own misconduct. He may then find himself in great difficulty if the attention of the King's Proctor is drawn to the omission. On the contrary, failure to disclose material facts is unlikely to occur by inadvertence if the matter has been carefully discussed between the petitioner and his solicitor and the facts have been reduced into writing. Recently it has become the practice that notice shall be given to the other spouse of any allegation of conduct on his or her part not referred to in the pleadings which the petitioner is making by way of excuse for his or her own adultery.

In the argument in this case the King's Proctor made it plain that he attaches the greatest importance to the preservation of this practice. It is, however, necessary that petitioners should be safeguarded from any hostile use of the statement so that there may be no indirect contravention of s. 198. In *Cullen* v. *Cullen* (1) the Master of the Rolls said: "There is no indication that it was intended by the practice or by the sections that this statement revealing the petitioner's adultery was to enure in favour of the other spouse. It is plain, therefore, that there is a discretion given to the Court as to how it will exercise the powers given it under the proviso to s. 178." It is the practice, therefore,

(1) [1933] P. 218, 222.

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not to permit any other party to inspect the statement on the file without leave of a judge, and it has recently been held by Langton J. in *Bevis* v. *Bevis* (1) that the statement is not admissible as evidence on which to found a petition against the spouse making it.

In the course of the argument, however, it soon became apparent that it raised issues much more important than any mere point of procedure or practice. As the argument developed it took two forms which are mutually inconsistent. It was said, first, that the existence of a deed containing the clause in question relieved the petitioner of any obligation to refer to her antecedent adultery on the ground not merely that it had been condoned by the deed, but that all rights in respect of it had been completely released by the husband, and indeed that by the very wording of the clause "no act of the petitioner in relation to such offence shall be admissible in evidence." But, as I have already stated, counsel began by opening that adultery had been committed; and the second branch of his argument was that the Court ought to exercise discretion in favour of the petitioner, notwithstanding such adultery, on the ground that the deed of separation was conclusive to show that it had been condoned by the husband, and obliged the petitioner to refuse, and the Court to uphold her refusal, to give any further evidence of the circumstances in which she committed adultery, or of the matrimonial history in so far as it was relevant in extenuation of her offence.

It is manifest that either branch of the argument would have the most far-reaching consequences. No simpler method could be devised for the presentation of collusive suits; nor was the probability that this result would follow diminished by counsel's subsequent argument that though actual collusion would vitiate such a deed, and though in certain circumstances the existence of the deed itself might be evidence of collusion, it was not open to the Court to go behind the deed unless and until there was a formal allegation of collusion and its existence had been proved aliunde.

In order that the full implications of this submission may

(1) Ante p. 22.

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be understood it is only necessary to suppose a case where for a long period before the date of the deed both parties had been living to each other's knowledge in adultery, the conduct of each conducing to that of the other, and in which the wife filed a petition based on evidence of an act of adultery committed by the husband shortly after the execution of the deed. Counsel admitted that such a matrimonial history coupled with the deed, would be cogent evidence that the petition had been presented in collusion; and he admitted that his argument led to the conclusion that the adultery of the wife need not, and, indeed, ought not to be referred to, and that the matrimonial history under the circumstances in which the deed came to be executed could not be inquired into, unless and until it had been established by some other means that collusion existed.

In these circumstances I thought it necessary before I accepted such an argument to refer the matter to the King's Proctor for his assistance, under the Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1, and I have had the advantage of an argument by the Attorney-General who appeared for the King's Proctor.

I now proceed to state the material facts: The parties were married on September 27, 1921. The husband was 49 and the wife was 27 at that date. Since that time the petitioner has given birth to four children. In the course of her evidence the wife stated that during the course of her married life, and before the deed of separation, she had committed adultery with two men whom she named; that she had not committed adultery with any other man, and that she had not committed adultery since the deed of separation. She also stated that at the time the deed was executed her husband knew of her previous adultery, and that at her husband's instance her two elder children had been made Wards in Chancery. The deed of separation was dated December 31, 1932; it contained three recitals: the first a recital of the existence of matrimonial differences, the second of the birth of the two elder children, and the third a recital of the birth and parentage of the two other children. As

I have already mentioned, counsel, at the beginning of his opening, said that the deed of separation contained an admission that the wife had committed adultery. There is no such statement in terms, but he was referring to this third recital. He was obliged to admit, however, that by virtue of the decision in *Russell* v. *Russell* (1) I am not permitted to look at this recital. The admissible evidence, therefore, of the wife's adultery up to this point, is limited to her own statements that she committed adultery with two men and that her husband knew about it. Evidence was called that the husband committed adultery with the woman named between September, 1933, and March, 1934. The petition was filed on March 15, 1934. In answer to a question by me, counsel said that this was all the evidence that he proposed to adduce, and invited me to deal with the case on this material. In support of his contention that he was disabled by the covenant in the deed from putting any other evidence before the Court he argued that it was desirable in the public interest that married people should be encouraged to adjust their differences, and submitted that it was difficult to ensure that differences were adjusted without some such clause. He relied on *Rowley* v. *Rowley* (2) and on the fact that the particular clause in this deed had stood for fifty years since its approval by the Court of Appeal in *Rose* v. *Rose* (3) and had recently been approved by Lord Merrivale in the case of *L.* v. *L.* (4) As to this part of the argument it seems to me to be established beyond question that, as between the parties not only is it not against public interest that such a clause should be included in a deed of separation but that such clauses are positively beneficial. Counsel admitted that no agreement by the parties could affect the obligation of the Court to carry out the duties imposed upon it by the Judicature (Consolidation) Act, 1925, s. 178. He contended, however, that in *L.* v. *L.* (4) and in the case of *Heath* v. *Heath & Frost* (5), heard on May 1, 1933, Lord Merrivale had held

(1) [1924] A. C. 687.
(2) L. R. 1 H. L. Sc. 63.
(3) 8 P. D. 98.
(4) [1931] P. 63, 74.
(5) Unreported, see comment on next page.

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that the existence of this covenant precluded any inquiry into antecedent misconduct on the part of the petitioner and obviated the necessity for invoking the discretion of the Court. At the least, he argued, it prevented the petitioner from giving any evidence herself or tendering any evidence, whether oral or documentary, as to the matrimonial history antecedent to the deed.

I will deal first with the case of *Heath* v. *Heath*. (1) In a transcript of the shorthand notes with which I have been supplied in opening the case to Lord Merrivale counsel is reported as follows: "Then there is clause 9, this is a very important clause. It is the *Rose* v. *Rose* clause in full." The President: "I notice the third and fourth recitals in the separation deed." Counsel: "Under these circumstances I do not propose to go into any matters, whoever may be at fault, anterior to the deed of that date." There is no further comment by Lord Merrivale. The report does not show what the third and fourth recitals contain. But counsel informs me that the passage I have quoted was intended to convey to Lord Merrivale that the wife had been guilty of adultery but nevertheless was not invoking the discretion of the Court, and that Lord Merrivale was, in fact, aware of the adultery, and was assenting to this course. I must admit that, on reading the transcript without counsel's assistance this interpretation of the passage did not occur to me, but I need scarcely say that I accept his statement that in some way, whether by reason of the recitals or otherwise, Lord Merrivale was aware of the facts. Counsel, however, speaking on the instructions of the King's Proctor, has made it clear that the King's Proctor had not become aware that there were any special features in that case. Nor was he aware of any other case in which a similar course had been taken to his knowledge. I find myself entirely unable to accept that case as being intended to be a decision of such far-reaching importance. The case of *L.* v. *L.* (2) requires closer consideration. In this case a deed of separation was entered into on December 20, 1929, containing a clause identical with

(1) Unreported. (2) [1931] P. 63, 74.

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that in the present case. On August 13, 1930, the wife filed a petition for divorce, based on adultery of the husband since the date of the deed. The petition contained no prayer for discretion. In his answer the husband, while denying the charge of adultery made against him, counter-charged the wife with adultery, the last charge being before the date of the deed. The case came before Lord Merrivale on a motion to strike out of the husband's answer the paragraphs making the counter-charge. The argument for the husband took the form that, as the wife could not by her own covenant preclude the Court from inquiring into antecedent matrimonial offences, the clause was against public policy as being an instrument whereby the Court might be deceived and have matters kept from it which were essential to its decision.

So far the argument appears to resemble very closely the considerations as to public policy in relation to collusion to which I have already alluded. But there is this important distinction. From this it was sought to deduce the conclusion that it was the duty of the respondent to recriminate and that a covenant which prevented him from doing so was against public policy. This argument might appear to be somewhat bold having regard to the decisions in *Rowley* v. *Rowley* (1) and *Rose* v. *Rose* (2), but it was suggested that public policy in 1931 differed from public policy in 1883, and that the decision of the House of Lords in *Hyman* v. *Hyman* (3) that a covenant for the provision of maintenance at a certain date in a separation deed did not preclude the Court from awarding the appropriate maintenance upon a decree of dissolution had affected the principles of the decision in *Rose* v. *Rose*. (2) In other words, the question in *L.* v. *L.* (4) was not whether the covenant absolved the petitioner from making full disclosure of her own conduct but whether it was against public policy that the husband should be prevented from making counter-charges against his wife notwithstanding his covenant to refrain from doing so. That this is so is made clear both by the report of the argument and by Lord

(1) L. R. 1 H. L. Sc. 63.
(2) 7 P. D. 225; 8 P. D. 98.
(3) [1929] A. C. 601.
(4) [1931] P. 63, 71, 72.

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Merrivale's judgment. He says: "Putting it in the broadest way, it is said on behalf of the husband here that these parties, in view of the nature of the statutes and the jurisdiction, could not lawfully enter into an agreement which precluded one or the other of them from alleging misconduct of the other in any proceedings in this jurisdiction affecting their marriage." The context shows that the emphasis is upon the word "alleging." Again, after referring to the duties imposed on the Court by s. 178, he says: "Public interest is said to require that there shall be a complete investigation of the relations of the parties, and the respondent, having been made a suitor, must conform to that requirement of public interest." He then proceeds to refer to the necessity for a petitioner for divorce, who is seeking the exercise of the discretion, to make disclosure of the facts in respect of which the exercise of the discretion is sought, and adds: "That, of course, is an important matter in the exercise of the jurisdiction in divorce, but that, so far as I know, is the extreme length to which practice or authority has gone in respect of disclosure of that kind." And then he adds the significant sentence: "No citizen is under any obligation to become a suitor for divorce." Having regard to the fact that this case was decided some nine months after his own direction regarding the prayer for discretion, to which reference has already been made, it is inconceivable that in the passage I have just quoted he was intending to impose any limits on the necessity of full and frank disclosure on one who elected to become a suitor for divorce. But he contrasted with this the supposed obligation on a respondent, who has been made a suitor, to recriminate; held that there was no such duty upon the respondent, and reaffirmed that, as between the parties, it was in the public interest that they should enter into an agreement precluding mutual recrimination. It is also worth observing that, having regard to the practice recently instituted by the President's own direction, there could be no question as the pleadings were constituted, of the exercise of discretion in favour of the petitioner. Nor was there a cross-prayer based on a counter-charge by the

husband. The issue on the pleadings as they stood was whether or not the husband should be allowed to defeat the wife's petition by making counter-charges in respect of matters covered by the covenant.

I may add that though nothing appears about this in the report I was informed by counsel, speaking on instructions, that the King's Proctor made a full investigation and was completely satisfied that in fact there was no ground for impugning the wife's conduct in any way. For these reasons I cannot regard this case as having been intended to decide that a petitioner who has in fact committed adultery is by the existence of the covenant in question absolved from invoking the discretion of the Court or from the necessity of making full and candid disclosure of the circumstances in which the discretion is invoked.

It seems to me reasonably clear that in *Rose* v. *Rose* (1) itself the Court of Appeal was not contemplating that any such result would follow from their decision. In that case Sir George Jessel M.R. said: "We were referred to another doctrine; it is said that adultery by a husband, however condoned or got rid of by deed, would prevent his obtaining a decree for dissolution, and that this shows that condonation of matrimonial offences is not final. That question may come before the Court of Appeal, and I do not mean to give a concluded opinion upon it, but my present impression is that adultery by a husband which has been condoned is not necessarily a bar to his obtaining a dissolution for adultery of the wife, and the point must be considered as open."

It seems to me that in this passage Sir George Jessel was saying that on the one hand the fact that the husband has committed adultery is not necessarily a bar to a decree, and that on the other hand the fact that the wife has condoned his adultery is not necessarily decisive, but that the whole matter must be inquired into.

Again in *Harriman* v. *Harriman* (2) Lord Cozens-Hardy M.R. held that the non-cohabitation provision in a magistrates' order, while it might perhaps operate by way of estoppel

(1) 8 P. D. 98. (2) [1909] P. 123, 131, 142.

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inter partes, could not in any way estop the Court. "For," he said, "the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied." In the same case Fletcher Moulton L.J. said: "By section 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the Court being satisfied on the evidence that the case of the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them." This view was expressly approved in the case of *Hyman* v. *Hyman* (1) particularly in the judgment of the present Master of the Rolls, where he precedes a quotation of the passage from the judgment of Lord Cozens-Hardy, which I have just read, by the words: "The Court cannot forego its duties, and it cannot be bound by an estoppel between the parties." The very point that I have to decide, however, seems to me to be covered by a passage in the judgment in *Gooch* v. *Gooch*. (2) In that case it was held that a covenant in a deed of separation obliging the parties not to commence or prosecute proceedings in respect of any antecedent cause of complaint was not equivalent to condonation and did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed. The covenant itself differed essentially from that in *Rose* v. *Rose* (3), but it was argued that it had the same effect. In the course of his judgment Lord St. Helier sets out the effect of the covenant in *Rose* v. *Rose* (3) in words upon which I cannot attempt to improve: "But it is clear, I think, that the parties cannot, by stipulation, produce any higher effect than they can by condonation, or can impose on the Court the necessity of

(1) [1929] P. 1, 28. (2) [1893] P. 99, 106.
(3) 7 P. D. 225.

granting a judicial separation notwithstanding the adultery of the petitioner. It is clear from the authorities ending with the cases of *Rowley* v. *Rowley* (1), *Besant* v. *Wood* (2), and *Rose* v. *Rose* (3), that no rule of public policy, nor any other rule, prevents parties from agreeing that they will not found an application to the Court on past misconduct. The view of the law in the present day, no doubt, is that, as parties can compromise, and agree to compromise, a suit, so they can agree not to bring it, or can agree not to put forward specified matters as foundation for it. But it is altogether another thing to say, and I do not think that any of the last-mentioned cases show, that the parties can by any arrangement between themselves dictate to the Court on what principle relief sought is to be granted. If it is a rule that an adulterous spouse cannot obtain a judicial separation or dissolution except under certain specified circumstances recognized by judicial authority, the parties, surely, cannot by any agreement relax or modify that rule. They may contract themselves out of their rights, but they cannot contract the Court out of its duty. That would be to make a law for themselves."

For these reasons I indicated to counsel at the conclusion of his argument that I did not feel that I had sufficient material upon which I could fairly be asked to decide how my discretion should be exercised. Being very reluctant, however, to decide this suit on what I regarded as a misconception of the effect of the covenant, I gave the petitioner yet another opportunity to put herself fairly in the hands of the Court. Accordingly she has now made a discretion statement and notice of its contents has been given to the respondent. I have heard her evidence. It is sufficient to say that in both instances her adultery was preceded by at least two cases of infidelity on the part of the respondent, and that he has been guilty of numerous acts of adultery in circumstances usually held to aggravate the offence. I am referring to the fact that the petitioner has spoken of infidelity

(1) L. R. 1 H. L. Sc. 63. (2) (1879) 12 Ch. D. 605.
(3) 7 P. D. 225; 8 P. D. 98.

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with women in their household, or in the business in which the petitioner and the respondent were mutually engaged; and finally for at least two years before the deed of separation which has been discussed in this case, the respondent had been associating with the woman with regard to whom evidence of adultery in the months succeeding the execution of the deed was given. I have no hesitation in saying that this is a case in which the Court should exercise its discretion and grant to the petitioner the relief she seeks.

Decree nisi. Costs against the respondent. The King's Proctor neither receiving nor paying costs.

Solicitors: *Rowe & Maw; The King's Proctor.*

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Nov. 26.

DAVIES OTHERWISE MASON *v.* DAVIES.

Nullity—Incapacity to consummate—Jurisdiction—Suit by incapable Petitioner—Repudiation of marriage contract by Respondent.

In a suit for nullity of marriage on the ground of incapacity to consummate it the Court granted a decree to a petitioner who was the incapable spouse, finding as a fact that the other spouse had repudiated the marriage contract, but expressly refrained from deciding that there is jurisdiction to entertain such a suit at the instance of an incapable petitioner in the absence of repudiation of the contract by the other spouse.

PETITION by a woman for nullity of marriage on the ground of her own incapacity to consummate. The ceremony took place on May 25, 1930.

The petition contained averments that at the time of the ceremony the petitioner was and had ever since remained incapable of consummating the marriage, that at the time of the marriage the petitioner was unaware of her incapacity to consummate it and that the respondent had repudiated the relationship of husband and the obligations of the marriage contract.

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By particulars of the petition it was alleged that the respondent had not provided a home for the petitioner or contributed anything towards her support, had had no concern for her welfare when ill and had said that he had lost all desire for intercourse, that he had no intention of living with the petitioner and that she could go her own way.

The Registry having refused to receive the petition on the file, being the petition of a spouse avowedly in fault, the petitioner appealed to the judge in Chambers, who gave leave to file the petition provided that an allegation on the facts of repudiation of the marriage by the respondent was inserted. The inspectors reported that the petitioner was a virgin and that no physical impediment to consummation existed. The respondent did not attend for examination.

The case for the petitioner was that efforts to consummate the marriage were frequent until the end of the month of June following the ceremony and thenceforward occasional until June, 1931, when they practically ceased; that they resulted in failure to penetrate on the part of the man, with pain and sickness resulting to the woman. Independent medical evidence called on behalf of the woman was to the effect that on examination she appeared a virgin and that consummation was impossible owing to her physical and nervous condition. The inspector who was called in support of the petition said that the condition of the woman was probably psychical rather than physical, causing an abnormal repulsion to the sexual act. There was no suggestion against the potency of the respondent.

Hon. Victor Russell for the petitioner. The facts are on all fours with those in *G.* v. *G.* (1) The Court is asked on the facts of this case to follow the principle there laid down and to infer an invincible repugnance of the woman only consistent with her incapacity. If that conclusion is once reached on the facts no difficulty arises from the party in fault being the complainant. In the Irish case of *A.* v. *A.* (2) it was held that if the respondent in a suit of this nature

(1) [1924] A. C. 349, 353. (2) (1887) 19 L. R. Ir. 403.

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repudiates the relationship of a married person and the obligations of the marriage contract, the impotent party may show that no verum matrimonium exists and may maintain his or her suit. The conduct of this respondent amounts to such a repudiation. In *G.* v. *G.* falsely called *K.* (1) Cozens-Hardy M.R. followed the Irish case, which is therefore an authority that will be followed in this Court provided that there is repudiation. In a note to *Norton* v. *Seton* (2) the authority of Sir William Wynne going still further is cited for the proposition that a woman may institute a suit for nullity of marriage against her husband on account of impotency or incapacity in herself to perform the duties of marriage. This high authority, therefore, does not even insist on repudiation.

[He also referred to *Halfen* v. *Boddington.* (3)]

The respondent did not appear.

LANGTON J. I pronounce a decree nisi. I do so on the ground that the respondent has repudiated the marriage contract although the petitioner was actually the party owing to whose misfortune the jurisdiction of the Court arises. I expressly refrain from laying down affirmatively that there is jurisdiction to entertain a suit merely on the ground of the incapacity of the petitioner, if there has been no repudiation of the contract by the other spouse. There will be no costs.

Solicitors : *Gilbert, Clarke & Gilbert.*

(1) (1908) 25 Times L. R. 328, 329. (2) (1819) 3 Phill. Ecc. 147, 149.
(3) (1881) 6 P. D. 13.

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TRINDER *v.* TRINDER (MIDWINTER, Co-respondent).

C. A. 1934 Dec. 17.

Divorce—Practice—Husband's Petition—Order for trial by Jury—Abortive trials—Application by husband for Order for trial by Judge alone—Jurisdiction—Matrimonial Causes Rules, 1924, *r.* 30 (*B*)—*Rules of Supreme Court, Order* xxxvi, *r.* 1.

By the Matrimonial Causes Rules, 1924, r. 30 (B): "Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a Common Jury and all other causes shall be heard by the Court itself without a Jury."

A husband filed a petition against his wife for divorce on the ground of her alleged adultery with the co-respondent, but claimed no damages against him. He subsequently obtained an order from the judge under r. 30 (B) of the Matrimonial Causes Rules, 1924, that the issue should be tried before a special jury. The petition was twice tried, and on each occasion the jury failed to agree and were discharged. The husband then applied to the President for an order that the order for a jury which had been made should be discharged and that the petition should be tried by a judge alone. The President made the order. On appeal:—

Held, that under r. 30 (B) the President had jurisdiction to order that the further trial of the petition should be before a judge alone; that the power given by that rule to direct the method of trial was not limited to one application and one order only, but enabled the Court to determine from time to time what was the right mode of trial.

Held also, that the order made by the President in the judicial exercise of his discretion was a proper one to make in the circumstances of the case. Per Slesser L.J.: Order xxxvi, r. 1, of the Rules of the Supreme Court did not confer jurisdiction to make the order.

Rugg-Gunn v. *Rugg-Gunn and Archer* [1931] P. 147 applied.

Appeal from the President (Sir Boyd Merriman).

In May, 1933, the husband filed a petition for divorce against his wife on the ground of her alleged adultery with two co-respondents. No damages were claimed by the petition. He subsequently obtained from the judge under r. 30 (B) of the Matrimonial Causes Rules, 1924, an order that the issue should be tried before a special jury. At the first trial before Bateson J. and a special jury on June 7, 1934, the jury stopped the case against one of the co-respondents and he was dismissed from the petition. The case then proceeded against the wife and the other co-respondent, and

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after a seven days' hearing the jury failed to agree and were discharged. The petition was again set down by the husband and came on for trial before Langton J. and a special jury on November 6, 1934. After a six days' hearing the jury were again unable to agree. The husband then took out the present summons before the President under Order XXXVI., r. 1, of the Rules of the Supreme Court for an order that the order for a jury should be discharged and that an order should be made for the trial of the petition by a judge alone. The President made the order.

The wife appealed. The appeal was heard on December 17, 1934.

Malcolm Hilbery K.C. and *P. B. Morle* for the wife. It is submitted (1.) that the President had no jurisdiction to make the present order, and (2.) that if he had he ought not to have made it in the circumstances of the case.

Under the Matrimonial Causes Act, 1857, s. 28, either of the parties was entitled as of right to demand a jury. That section was, however, repealed by the Judicature Consolidation Act, 1925, and the question whether a jury should be granted is now one for the discretion of the Court : see *Rugg-Gunn* v. *Rugg-Gunn and Archer.* (1)

By r. 30 (B) of the Matrimonial Causes Rules, 1924 : " Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a Common Jury and all other causes shall be heard by the Court itself without a Jury." Here the husband has already obtained an order under that rule for a trial by jury and has had his petition twice tried before a special jury. That order still stands good and ought not to be discharged and an order for a trial before a judge alone made.

Order XXXVI., r. 1, of the Rules of the Supreme Court, under which the present application was made, has no application to matrimonial causes.

Gibbs Kimber for the co-respondent supported the same view.

(1) [1931] P. 147.

Pritt K.C. and *T. Bucknill* for the husband. The Divorce Court has jurisdiction under r. 30 (B) of the Matrimonial Causes Rules, 1924, to alter its own order.

[LORD HANWORTH M.R. I should be sorry to think that the Registrar had not power under that rule to deal with the matter.]

As regards the discretion of the President to make the order he did it is submitted that in the circumstances of the case it was rightly exercised.

Hilbery K.C. replied.

LORD HANWORTH M.R. This appeal raises a matter which is of some importance generally, and particularly to the parties engaged in the petition. The petition is one presented by a husband who seeks a decree of divorce against his wife. At the first trial in June, 1934, a charge was made against the wife and two co-respondents. After the trial had been in progress for some time one of the co-respondents was discharged from the petition because the jury who were trying the case at that time intervened and intimated that they could not find that that particular co-respondent had committed adultery with the respondent wife. The trial proceeded on the charges mentioned against the other co-respondent, but after a very long deliberation the jury were unable to agree upon their verdict. A second trial then took place in November, 1934, and the charge was again presented by the husband against the wife with the one remaining co-respondent. In both trials there was a special jury engaged to assist the Court. Once more, after a prolonged trial, the special jury failed to agree. The result was that there have been two trials before two judges, and two special juries, and on each occasion the jury have found it impossible to agree. A summons was then taken out before the President that the case should now be presented, not for trial before another special jury, but that there should be an order that the trial should take place before a judge alone. The learned judge in giving his judgment said: "I am bound to be the judge this time" the previous trials having taken

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place before Bateson J. and Langton J. "and in view of that statement I think I must make quite sure that other people decide what is to be the method of trial." And later he said: "I think myself this order ought to be made. If I have no jurisdiction to make it, I shall refuse it and give leave to appeal. If I have jurisdiction to make it, I shall make it and give leave to appeal, because I would much prefer, as I am the unfortunate person who will have to try this case for the third time, that somebody else should say whether this mode of trial is proper or not. I hope that will be conveyed to the Court of Appeal. I am not anxious to decide one way or the other whether I should decide this case." I have read these exact terms of the President, because I am anxious to indicate quite plainly that the case comes before us by way of rehearing, and it is obviously the President's wish that this Court should have a complete opportunity of intervening and expressing an opinion as to what ought to be done, and he did not desire to fetter or circumscribe the decision in this case by saying that it was a matter of discretion exercised by him. He therefore made the order for trial before a judge alone.

On December 7 notice of appeal was given to this Court, and we have had the matter now fully argued. Two points arise. The first is whether there was jurisdiction on the part of the learned President to make an order for trial different from that which had been originally provided for; and, secondly, if there was jurisdiction to make an order altering the course of the trial, whether or not an application that the trial should be before a judge alone ought to be acceded to.

On the question of jurisdiction I have no doubt. I need not go further back than *Rugg-Gunn* v. *Rugg-Gunn and Archer*. (1) In that case an order had been made by Langton J. that one issue, the issue of adultery, should be tried with a jury. There was another charge, a counter-charge of cruelty against the petitioner, and it was ordered that that issue should be tried before a judge alone. It was suggested that

(1) [1931] P. 147.

there was a right to have the issue of cruelty tried before a jury; the question of the jurisdiction of the Court as to a trial by a jury was carefully considered by Langton J., and in his judgment he came to the conclusion that it was a matter of discretion now for the Court. On appeal, that decision was affirmed, and I pointed out in my judgment (1) that in the exercise of his discretion the learned judge had a right to differentiate between the two separate issues of adultery and cruelty, and reserve the issue of cruelty for the decision of the Court and refuse to let it go before a jury. After going through the statutes, I came to this conclusion (2): "Langton J. has traced the rules in point, and we agree with him that, putting it shortly, s. 28 [of the Matrimonial Causes Act, 1857,] is no longer law. Therefore the right to insist on a jury is no longer existent, and if a jury is granted it is under the powers given to the Court by the Rules which at the same time do not circumscribe the power of the Court to say that a case shall be tried by a judge alone. The Matrimonial Causes Rules, 1924, in rr. 30 to 34, which deal with trial or hearing, contain no provisions giving a right to either party to demand a jury." I agreed with the decision, which was the decision of the Court.

I come therefore to consider rr. 30 to 34 of the Matrimonial Causes Rules, 1924. Rule 30 (B) says: "Unless a Registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a Common Jury and all other causes shall be heard by the Court itself without a Jury." In the present petition damages are not claimed, and therefore the provision that trial should be by common jury does not apply to the present case. There was, however, an order made by the judge for a trial with a jury, these matters, as I understand, being sent to the judge himself and not dealt with by the Registrar only. That order for trial before a jury was not one made as of right, but was made as suitable to the particular case. There have been two trials before juries and a failure to secure a definite result.

(1) [1931] P. 147, 160. (2) Ibid. 161.

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In my view, it is plain that under r. 30 (B) it was open to the President to make an order that the further trial, the new trial of this petition, should be before a judge alone. I think that the words of r. 30 (B), " Unless a Registrar shall otherwise order " apply to such a case. There is no limit of time, there is no circumscribing of the powers of the Registrar, and it appears to me that just as in the case which Romer L.J. gave by way of illustration, namely, that if an order had been made for a particular date for the trial, there would be power to change it, so here, the powers given under r. 30 (B) are not to be treated as limited to one application and one order only. I think that the rule contains a power of determining from time to time what is the right mode of trial. It seems to me unnecessary to invoke the power contained under Order XXXVI., r. 1, of the Rules of the Supreme Court. That might involve a more difficult matter. The present order seems to me to fall within the powers of r. 30 (B).

Now comes the more difficult question whether or not the President was right in his discretion in making the order. If he had not been so explicit in the terms used in his judgment, I should have been content to say that it was a matter for his discretion, and that this Court would not interfere. It ought to be made as plain as plain can be that this Court will not interfere with the discretion of the judge exercised judicially and in accordance with the proper rules. But the learned judge has placed this Court in a position of rehearing the matter, and he does not wish that the case should be determined merely as one of discretion. I therefore apply myself to the considerations which ought to govern such a case as this. I bear in mind that r. 30 (B) provides that only in cases where there is a claim for damages is there a right to a jury, or, rather, not a right but an indication that the mode of trial should be by a jury. As I have said, the question of a jury or not is now one which is entirely open, and I do not want to repeat what I said in *Rugg-Gunn* v. *Rugg-Gunn and Archer* (1), but it must be remembered that there are a number of cases in which it has been held

(1) [1931] P. 147.

that a jury would be the more appropriate form of trial. Such cases, which are indicated in s. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, are where there is a charge of fraud against a particular party, or a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage. Where those matters are in issue the terms of the statute are that the action shall be ordered to be tried by a jury, unless the Court should be of opinion that the trial requires any prolonged examination of documents or accounts, or scientific or local investigations which cannot conveniently be made with a jury. It is quite right to say, as Mr. Hilbery has done, that this charge does involve a serious personal charge against the wife; it is of the nature of the charges which I have just referred to in s. 6, and I think that in ordinary cases, if there had been a demand that the trial should be before a jury, it would have been more usual to make the order for a trial by and with a jury. I am not forgetting that in the present case the appeal that the jury should be empannelled is supported by the co-respondent, whose honour is imperilled and who desires to have the verdict of a jury.

I approach the matter therefore with a view that a jury is appropriate in such a case. On the other hand, there are matters to which attention has been called and which, I confess, have altered my original opinion. It has been pointed out that the case has been tried twice already, that a considerable amount of publicity has been given to the case, that there is a certain amount of correspondence to be considered, and there is some evidence of medical details by no means beyond the capacity of a jury to master, but still matters on which different views might be held by those who hear that evidence. No doubt the jury would be directed to pay no attention to the previous trials, and certainly not to any matters which they have read in the current journals of the day. At the same time, those are factors which cannot be left outside of the picture, and, though the President has said that it is difficult for him to give a decision, yet he has

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come to the conclusion which is expressed as follows: "I think myself this order ought to be made. If I have no jurisdiction to make it, I shall refuse it and give leave to appeal; if I have jurisdiction to make it, I shall make it and give leave to appeal." Now, I think that the considerations which have been taken into account are nicely balanced. There is jurisdiction to make this order. Although I should be sorry to displace in most cases the jury from their position when personal charges are to be tried, yet I cannot overlook the questions which must arise in consequence of previous trials—publicity and the like—and I find myself unable to take a view different from that expressed by the President, which, although it is not placed before us as an exercise of discretion, is entitled to the great weight which his decisions must always carry, and I find myself, therefore, unable to differ from the order which he has made—namely, that the case should be tried by a judge alone. For these reasons, the appeal must be dismissed with costs.

SLESSER L.J. I agree, and have only to deal with one matter in this case. I do not repeat the reasons which my Lord has stated why the Court has come to the conclusion that the decision of the learned judge, if he had jurisdiction, as I think he had, should not be disturbed. The matter with which I wish to deal very shortly is that reading the President's interlocutory observations in the argument of Mr. Pritt, it appears that he came to the conclusion that he had jurisdiction under the Rules of the Supreme Court; a ground on which I think he was mistaken. I agree with my Lord that the provisions of r. 30 (B) of the Matrimonial Causes Rules, 1924, which provide that: "Unless a Registrar" —and in this case the judge—"shall otherwise order on summons, all causes in which damages are claimed shall be tried by a Common Jury and all other causes shall be heard by the Court itself without a Jury"—give power to the Registrar or the judge in proper cases to alter the order for sufficient cause, but that very conclusion which I come to on that language of itself does not allow the

application of r. 97 of the Matrimonial Causes Rules, 1924, which only deals with matters of practice and procedure not governed by r. 30. In my view, the matter is governed by r. 30 and that rule alone.

Secondly, even were the matter to be so governed that one could invoke the powers given under Order XXXVI., r. 1, of the Rules of the Supreme Court, I do not think that that rule would here be of any value to the appellant, because the language on which she relies that the mode and place of trial so directed may be subsequently altered for sufficient cause, refers to the mode and place of trial directed under the provisions of Order XXXVI., r. 1; and as this application is not to be considered as being made under those rules, but under the Matrimonial Causes Rules, I think that the proviso to the operative part of r. 1 cannot be brought into effect. In my opinion, the reason why there is no such provision specifically for alteration in r. 30 (B) is because that rule is wide enough in itself to deal with the matter without any specific provision for alteration, and the mere fact of the possibility in the pendency of the action of such matters as are mentioned in Order XXXVI. of the Rules of the Supreme Court is no reason for excluding the power of the Court under the Matrimonial Causes Rules.

ROMER L.J. I agree, and I only want to add this. Looking at *Rugg-Gunn* v. *Rugg-Gunn and Archer* (1) it is to be observed that there the Registrar on November 6, 1930, ordered a trial of the case by a special jury, which means that he ordered the trial of the whole case. But when at a later date the parties went back to him to settle particular issues to be tried by the jury he altered that order and came to the conclusion that as regarded the issue of cruelty it should not be tried by a jury. I cannot find that it was ever suggested in argument that the learned Registrar was functus officio when he made the second order for the trial of the issue of cruelty by the judge alone.

Appeal dismissed.

Solicitors: *Batchelor, Pirkis & Fry; Druces & Attlee.*

(1) [1931] P. 147.

W. I. C.

1934
Oct. 12.
C. A.
1935
Jan. 23.

THE LONDON CORPORATION.

Shipping—Collision—Reference to assess damages—Cost of repairing actual damage agreed—Vessel not repaired—Subsequent sale to ship-breakers—Absence of evidence that sale price was affected by collision damage—Right to damages.

The plaintiffs' and defendants' vessels, while laid up, ranged against each other and each sustained slight damage. Before any action was brought both vessels were surveyed, but no estimate of the cost of repairs was made. The plaintiffs' vessel was then sold to be broken up. The defendants afterwards agreed with the plaintiffs that the repairs, if executed, would cost 250*l.*, but no repairs were in fact done. The defendants contended that the plaintiffs had suffered no loss and were not entitled to any damages:—

Held, (i.) (by Bateson J. and the Court of Appeal), that the mere facts that the vessel had been sold to shipbreakers, and that the repairs would never be carried out, did not discharge the onus, which was on the defendants, of proving that the plaintiffs had suffered no damage; and (ii.) (by the Court of Appeal) that prima facie the value of a vessel damaged in collision is less, by the cost of the repairs, than her value if undamaged, and that the fact that a vessel has been sold to be broken up is an accidental circumstance not to be taken into account in the way of diminution of damages.

Motion in objection to the report of the registrar on a reference to assess damages.

The reference arose out of collisions between the plaintiffs' steamship *Benguela* and the defendants' steamship *London Corporation* in December, 1932, and January, 1933. Both vessels were laid up in the River Blackwater, and while lying at their moorings the vessels ranged and came into contact with each other, and each vessel suffered damage. A surveyor acting on behalf of both parties estimated that the actual damage to the *Benguela* would cost 250*l.* to repair and the actual damage to the *London Corporation* 230*l.*, and these figures were ultimately accepted by both parties. In May, 1933, the owners of the *Benguela* entered into a contract with a firm of Italian shipbreakers to sell the vessel as she lay for 4200*l.* to be broken up. In June, 1934, the owners of the *Benguela* issued their writ against the owners

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of the *London Corporation* and the action was settled upon the basis that both vessels were equally to blame and the damages were referred to the registrar for assessment.

The owners of the *Benguela* put forward a claim consisting of five items, three of them related to surveyors' and owners' superintendents' fees and petty expenses amounting in all to some 13*l.* odd, of which the plaintiffs claimed a moiety. These items were admitted; but the plaintiffs also claimed half the estimated cost of the repairs, 250*l.*, and the estimated expenses during repairs, 25*l.*

The registrar was of opinion that the facts brought the case within the decision in *The Glenfinlas* (1), where it was held that the owners of a vessel sunk before collision repairs had been effected could recover the estimated cost of the repairs from the wrongdoer. That case was approved by the Court of Appeal in *The Kingsway*. (2) He held, therefore, that the plaintiffs were entitled to recover half of the sums claimed. The defendants moved in objection to the report.

Cyril Miller for the defendants. The plaintiffs are entitled to recover the amount of the damage they, as owners, have suffered, not the amount of the actual physical damage to their ship, for that has not depreciated her value at all. There is no evidence that the breaking up price was reduced or that the sale was in consequence of the slight rubbing damage the vessel had received. It is for the plaintiffs to show that the price was adversely affected, for the plaintiffs must prove their damages. They had no intention at any time of repairing the vessel, and that fact distinguishes the case from *The Glenfinlas* (1) and *The Kingsway* (2), relied on by the registrar. In *The York* (3) Greer L.J. said that damages are intended to be "compensation for loss," and here there was no loss.

[BATESON J. To put the case on all fours with *The York* (3) I think you must prove that the vessel would not have fetched any more.]

(1) [1918] P. 363, *n.* (2) [1918] P. 344.
(3) [1929] P. 178, 187.

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Even if the price was affected at all it could not have been affected to the extent of 250*l.*

[*Willmer.* That point is not open to the defendants. If the plaintiffs are entitled to any damages, the amount has been agreed.]

[Reference was also made to *The Minnehaha.* (1)]

Willmer for the plaintiffs. Physical damage to the plaintiffs' chattel gives rise to a maritime lien, a liability, and gives the plaintiffs a right to damages without proving anything more; it is not like consequential damage, which must be strictly proved. Even if the defendants proved (which they have not) that the breaking up value was not affected, the subsequent history of the vessel is quite immaterial: see *The Endeavour.* (2) The mere fact that the repairs will not be executed makes no difference; in *The York* (3) Scrutton L.J. said that the ship owners rightly claimed the cost of doing permanent repairs, "because the ship when sunk was of less value to them, for she was in such a condition that she required permanent repairs." The case is entirely covered by the reasoning in *The Kingsway* (4) and *The Glenfinlas* (5), and the plaintiffs, as the registrar found, are entitled to a moiety of the 250*l.*, the agreed damages, if any damages at all are recoverable.

BATESON J. The facts of this case are set out in the learned registrar's reasons for his report, and it is unnecessary for me to recapitulate them. The only fact not set out in the report is that the parties agreed the amounts of items 3 and 4, the cost of the repair of this ship, before they entered on the reference. The sole question, therefore, as I understand it, is whether the plaintiffs are entitled to recover a moiety of 250*l.*, the amount agreed as being the item for repair, or are entitled to nothing.

It seems to me that Mr. Willmer is right in his contention that the plaintiffs' chattel having been damaged they are

(1) (1920) 2 Ll. L. R. 404; 6 Ll. L. R. 12.
(2) (1890) 6 Asp. M. L. C. 511.
(3) [1929] P. 178, 184.
(4) [1918] P. 344.
(5) [1918] P. 363, *n.*

entitled, in law, to recover damages. It may be that there might be a question as to the amount of those damages, but here there is no question of amount; that has been agreed. The plaintiffs say that if they are entitled to damages for injury to their chattel, the amount is agreed at the figure which is allowed by the registrar and there is an end of the case; and it is no concern of the defendants what they choose to do with their chattel. Mr. Willmer says that the fact that they sold it some three or four months after the accident to shipbreakers does not prove anything at all beyond the fact that they did sell it to shipbreakers, and got a certain sum for it. It does not prove, he says, that they got more or less because of damage, or the same, whether damaged or not—it proves nothing at all.

In *The Mediana* (1) Lord Halsbury said: "What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd." It is sometimes a matter of difficulty in assessing damages, but that the owner of a chattel is entitled to damages for injury to it seems to me now, at any rate, beyond controversy. Mr. Willmer points out that physical damage is quite different from consequential damage. That, he says, has been well recognized ever since the days of *The Endeavour* (2) and before it, too. That case was decided in 1890 by Sir James Hannen, who puts the matter very shortly: "The *Endeavour* has been injured. Her owners are entitled to be paid the amount of such injuries. It has been ascertained that that amount is 464*l*. That is the measure of the defendants' damages, and is the amount they are entitled to recover. If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled

(1) [1900] A. C. 113, 117. (2) (1890) 6 Asp. M. L. C. 511.

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to refuse to pay as part of the damages the cost of the repairs to the owner." So here, if the owners of the *Benguela* chose to give her away after this accident it would not be any ground for saying that the wrongdoer was not bound to pay for the damage that he had done. *The Endeavour* (1) has been followed in *The Glenfinlas* (2), a case approved in the Court of Appeal twice, and particularly by Scrutton L.J. in *The York*. (3) This ship was injured; if Mr. Miller's clients want to get out of paying for the damages I think they must show that the price the plaintiffs were paid for the ship was as good as it would have been if it had not been damaged. Mr. Willmer makes a complete case: "My ship was damaged; the amount of the damage has been agreed at 250*l*." If more evidence than that is required to get out of paying the damage I think the onus of proving it is on the defendants, and they have not by any means satisfied me; although Mr. Miller ingeniously tried to persuade me that the fact that the vessel was sold to shipbreakers showed that the injury to the chattel itself made no difference to the price. How can I say that? I think that people who buy damaged goods pay a less price than for sound goods, even though it makes no difference to them, personally. They use the fact to cheapen the article and knock something off its price. Similarly a man who sells a damaged article knows that he will not get the same price for it as if it was not damaged. It is no good saying it is damaged very little. Mr. Miller himself admits that there is no evidence that the price was not reduced by the damage or that the sale was not influenced because of the injury: nor is there any evidence the other way. I do not think he discharges the onus, as he said he did, by showing a sale for 4200*l*. to shipbreakers. To my mind that does not prove anything at all.

The learned registrar, who was assisted by a merchant, has decided that a ship damaged is not worth so much as a ship that is not. I think Scrutton L.J. said so in one of the cases; in *The York* (4) he said that the registrar had given the ship-

(1) 6 Asp. M. L. C. 511.
(2) [1918] P. 363, *n*.
(3) [1929] P. 178, 185.
(4) Ibid. 178, 185, 188.

owners the cost of permanent repairs rightly and obviously because "damage had been done to the ship, and at the time she was sunk she was of less value because of the damage done by the previous collision." He assumed that—I do not know that there was any evidence of it in that case, but that would be the natural assumption in any case. Mr. Miller relied on some observations of Greer L.J. in *The York*. (1) But there the Lord Justice was discussing the position of a vessel that had suffered damage by reason of the fact that she had been prevented from profitable use, and of course that would result in consequential damage. He was dealing there with consequential damage: there is no question of consequential damage here at all. I was also referred to *The Minnehaha* (2)—a case of the Italian State Railways against the *Minnehaha*—where the question before the registrar was as to whether the vessel should have been repaired at all, but that case does not seem to give me any assistance in deciding the present one.

For these reasons I think the learned registrar was right in the conclusion at which he came.

The defendants appealed. The appeal was heard on January 23, 1935.

I. H. Stranger K.C. and *Cyril Miller* for the appellants.

[The arguments were the same as in the Court below; in addition to the cases there cited, *The Marpessa* (3) and Roscoe's Measure of Damages in Maritime Collisions, 3rd ed., p. 9, were referred to.]

Willmer for the respondents was not called on.

GREER L.J. This is an appeal from the decision of the late Bateson J., affirming a decision of the registrar, with reference to one item of damage claimed by the owners of the s.s. *Benguela* against the owners of the s.s. *London Corporation* in relation to the agreed award that both parties

(1) [1929] P. 178, 185, 188. (2) 2 Ll. L. R. 404; 6 Ll. L. R. 12.
(3) [1907] A. C. 241.

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were responsible in equal degrees for the damage which was occasioned to the *Benguela*.

The *Benguela* was an old ship built in 1910. The owners of both ships were suffering from the unprecedented slump in shipping business, and their vessels were laid up in the Blackwater River; when laid up they came into touch with one another from time to time, and damage was occasioned to the *Benguela*, which was dealt with by the registrar, and, on appeal from him, on objection to his findings, by the learned judge.

The position was this. Before any action was started, or any agreement was made as to responsibility for the damage, there had been a survey by Lloyd's surveyor of the damage to each of these two vessels, and he estimated the damage done to the *Benguela* at the sum of 250*l.*—the cost of repairs to put her in the same position as she would have been in if she had not been damaged, with an additional sum of 25*l.* for expenses. Thereupon, the question arose as to how this matter should be dealt with, and letters passed between the representatives of both vessels. In the course of that correspondence, Messrs. Lawrence Jones & Co., for the *Benguela*, wrote this letter: " . . . . The question in dispute between us is, as to whether or not our clients are precluded from making a claim for estimated damage by reason of the fact that the *Benguela* has been sold for breaking up purposes. . . . . We would suggest, in the first instance, that we should meet you with a view to agreeing the amounts of the items other than repairs so that the matter to be dealt with either by the registrar or the arbitrator may be simply the question of estimated repairs." Then on May 9 Messrs. Middleton, Lewis & Clarke, for the *London Corporation*, wrote as follows: " We have now received our clients' instructions to agree the figures in respect of both claims as recently discussed with you subject to the reservations made with regard to the items to be dealt with by the registrar. After you have issued a writ and the agreement has been filed, we will send you our clients' formal claim, and when you send us your clients' claim, will you please also furnish a copy of the

agreement of sale of the *Benguela*." Then there followed another letter of May 10 from Lawrence Jones & Co., for the *Benguela* : " We thank you for your letter of the 9th May from which we observe that all the figures of the respective claims are agreed, leaving only to the registrar to decide the question of principle as to whether the estimated repairs and estimated expenses during repairs are recoverable. We will accordingly proceed with the matter on the lines arranged, and will send to you shortly the writ for acceptance of service." After that the writ was issued, and an agreement was come to, which has the effect of a judgment of the Court, that both vessels were to blame, and that the damage should be paid in equal proportions.

That being the state of things, the matter came before the registrar, and the registrar and the learned judge both decided that if in fact any damages were recoverable in respect of the injuries to the hull of the *Benguela*, the amount of those damages had been agreed at the 250*l.* plus the 25*l.* I find myself unable to differ from that view. I think that is what the parties intended. Prima facie, the damage occasioned to a vessel is the cost of repairs—the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done ; and prima facie, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that if that proposition were going to be established, it was for the owners of the *London Corporation* to establish it. The defendants argued, however, that that basis has no application to this case, because, at the time she was damaged, the *Benguela* was certain to have no saleable value for use as a ship ; all that could happen to her was what we know did happen to her after she was damaged, and which would, just in the same way, have happened to her if she had never been damaged. Well, if that be a fact to be taken into account,

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it seems to me that the learned judge was right in saying that it was for the defendants to establish it. He came to the conclusion that the defendants had failed in that burden, because non constat that this vessel would have been sold for breaking up if she had not been a damaged vessel. She might have lived on in the hope that even shipowners sometimes successfully entertain, that an old vessel may have useful service for years to come in a time of boom, which everybody hopes will come some day. Further it was not established that the owners would have parted with their vessel, if she had not been damaged, at the same price as they had got for the damaged vessel. It must not be lost sight of that the saleable value of a vessel does not depend merely upon what the purchaser says he would like to pay; it depends also on what the owner may feel that he can successfully hold out for, in the hope that another purchaser will come forward and give him a better price than that which has been offered.

I think that the learned judge was right in holding that some damages were necessarily established by the prima facie evidence, and that if some damages were established, then there was no question for the registrar as to their amount, as that amount had been agreed; and that alone would be sufficient to dispose of this case.

Quite apart from that, however, I agree with the learned judge that in cases of this sort, the prima facie damage is the cost of repair, and circumstances which are peculiar to the plaintiffs—namely, that they have, before the damage has been determined, sold the vessel to be broken up, is an accidental circumstance which ought not to be taken into account in the way of diminution of damages, any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that having regard to what the purchaser has done, no such damages are in fact suffered by him. It is desirable that there should be a measure of damage which can be easily and definitely found. In this case, circumstances which are accidental to the plaintiffs of which the defendants have no knowledge, or

circumstances applicable to the defendants of which the plaintiffs have no knowledge, need not be taken into account.

A number of cases have been cited, and I think it is clearly established now that where damage is done to a vessel, then some damages are recoverable. I think that is the result of cases like *The Mediana* (1) and *The Marpessa* (2) and the other cases that have been cited, such as *The York* (3); *The Kingsway* (4); and *The Endeavour.* (5) I need not go into the details of those cases. It is now clear that the shipowner, who claims damages in respect of injuries to his ship, if it turns out that before he has in fact repaired her he has suffered the loss of the ship by something other than the act of the defendant, can still recover the estimated amount of the cost of repairing the ship, which he would have had to incur if she had not been lost. It seems to me that the principles that apply in those cases apply equally in this: that the owners of the *Benguela* are entitled to recover what has been agreed to be the amount they would have had to expend for repairing their vessel, even though it has turned out, by reason of a subsequent transaction, namely, the sale to shipbreakers, that they never would have to repair her at all. Further, it does not by any means follow that the price paid by the shipbreakers would have been the same if the vessel had been fully repaired, as it was in her unrepaired condition.

For these reasons, I find myself unable to differ from the learned judge and the registrar, and the appeal must be dismissed with costs.

SLESSER L.J. I agree.

EVE J. I also agree.

Solicitors for the appellants: *Middleton, Lewis & Clarke.*
Solicitors for the respondents: *Lawrence Jones & Co.*

(1) [1900] A. C. 113.
(2) [1907] A. C. 241.
(3) [1929] P. 178.
(4) [1918] P. 344.
(5) 6 Asp. M. L. C. 511.

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Husband and Wife—Charge of abnormal practices of husband—Cruelty—Constructive desertion—Evidence—Corroboration—Appeal from Court of Summary Jurisdiction—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 (58 & 59 *Vict. c.* 39), *s.* 11, *to* 1925 (15 & 16 *Geo.* 5, *c.* 51).

On a complaint by a wife of abnormal sexual acts on the part of her husband, causing her to leave him, those acts if established must amount to cruelty in order to constitute constructive desertion by the husband.

There is no absolute rule of law or evidence in such a case that corroboration of the wife is necessary, or as to the extent of that corroboration; but there must at least be sufficient general evidence for the Court to infer that the acts occurred, that they were committed without the assent of the wife, and that injury to her health resulted, before the Court can find constructive desertion as a fact.

Statham v. *Statham* [1929] P. 131 commented on.

Appeal from a Court of Summary Jurisdiction.

The wife D. B. appealed from an order of a Court of Summary Jurisdiction dated October 23, 1934, dismissing an application by her under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

The application was for an order or orders under the Acts on the ground that W. B., the husband of the applicant, had deserted her. The alleged desertion was constructive and consisted chiefly of acts of perverted sexual intercourse on the part of the husband with the wife, which caused her to leave him on July 15, 1934.

The applicant in her evidence in the Court below denied that she had consented to what had taken place. A medical practitioner who attended the applicant gave evidence of her having made a " certain complaint " to him which he thought accounted for a condition of nervous debility which he observed. There was also corroborative evidence of a single case of violence to the applicant on the part of the husband on the day on which she left him.

The husband, at the hearing in the Court below, denied the more serious allegation against him as to perverse practices.

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On this evidence the Court of Summary Jurisdiction dismissed the application of the wife. The reasons for this decision were thus stated in the justices' note.

"The evidence of the wife as to perverted sexual acts of the husband was not corroborated (*Statham* v. *Statham* (1)) and, therefore, the Court was not satisfied that the conduct of the husband compelled the wife to leave him so as to constitute desertion."

The wife appealed to the Divisional Court against this dismissal of her application substantially on the ground argued—namely, as to the sufficiency of the corroboration of the wife as to the sexual conduct complained of.

F. L. C. Hodson for the appellant. The justices were wrong in founding themselves on a supposed necessity for corroboration. Even if corroboration were necessary, it was sufficiently present in the medical evidence that the condition of the appellant was consistent with a complaint made by her. *Statham* v. *Statham* (1) is not in reality an authority for the proposition that corroboration is necessary in the present case. In *Statham* v. *Statham* (1) the criminal offence of sodomy was the sole foundation of the wife's petition for divorce, and the decision followed the reasoning as to corroboration of *N.* v. *N.* (2), where the cruelty generally had been condoned and the case depended for its revival upon acts of attempted sodomy, but the present case is one of cruelty simpliciter. At least one act of violence is corroborated, and on the evidence generally the Court below should have given credence to the wife and found general cruelty justifying the wife in leaving and so establishing constructive desertion. The case should be remitted to the justices.

R. Talbot Dyer for the respondent. The practice of the Court is to require independent corroboration of a petitioner: *Judd* v. *Judd* (3), approved in *Harriman* v. *Harriman* (4); *Joseph* v. *Joseph* (5); *Williams* v. *Williams*. (6) Serious

(1) [1929] P. 131.
(2) (1862) 3 Sw. & Tr. 234.
(3) [1907] P. 241.
(4) [1909] P. 123, 146.
(5) [1915] P. 122.
(6) (1932) 96 J. P. 267; 76 Sol. Jo. 461.

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charges of the present kind are not safely left to depend upon the sole evidence of a party who is the accuser: *Moore* v. *Bishop of Oxford.* (1) The hypothesis of consent on the part of the accuser is not sufficiently repelled by a mere denial in her evidence in chief.

THE PRESIDENT (SIR BOYD MERRIMAN). This case has been well argued on both sides and raises a very difficult point, but I have come to the conclusion that the appeal ought to be dismissed. The summons was for desertion. In fact, the wife left the home. It was, therefore, necessary for her to show that it was the husband's conduct which had driven her out, to make him guilty of what is sometimes called "constructive desertion." In showing, or attempting to show, that it was the husband's conduct which had driven her out she relied on two things. The first I can dismiss in a sentence. She says that at the very moment when she left her home her husband told her to clear out and offered physical violence. Of course, it would plainly have been open to the justices, if they thought that that was the real cause of her leaving, to dispose of the matter then and there upon that; but it is perfectly obvious from the form of their judgment that they really paid very little attention, as a matter of weight of evidence, to that part of the case, and probably so because the wife herself said that the real cause of complaint was that which I am about to mention. She said that over a considerable time her husband had been guilty of the most filthy sexual practices in connection with her. It is obvious that in such circumstances, and on proper evidence, it would be fully open to the justices to hold that there was such treatment as to justify the wife in leaving and indeed to find substantive cruelty, if cruelty had been charged, provided in the latter case, at any rate, that it was coupled with evidence that the health of the wife suffered therefrom. But as the substance of the matter, though not the actual form of the charge, was that it was acts of this sort that had driven her away, I

(1) [1904] A. C. 283.

think—and indeed this is common ground to both the counsel who argued this case—that it is advisable that the justices should look for some corroboration on the part of the wife. The Court demands that when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated, and not least with regard to matters of the sort charged in this case about which, if there was not a reasonably strict rule in this respect, one spouse would be so easily at the mercy of the other in relation to things which from their nature must happen in private. But when that has been said it is admitted that the necessity for corroboration is not an absolute rule of law. Justices should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, if possible; but when that warning has been given and given in the fullest form, then there is no rule of law which prevents the tribunal finding the matter proved in the absence of corroboration. In this case at first sight, reading the reasons for the justices' decision, it certainly looks as if they had said that corroboration is required as a matter of law; but on a very full consideration of the note and the arguments on both sides I have come to the conclusion that that is not what they meant. They say: "The evidence of the wife as to perverted sexual acts of the husband was not corroborated (*Statham* v. *Statham* (1)) and, therefore, the Court was not satisfied that the conduct of the husband compelled the wife to leave him so as to constitute desertion," and the case was dismissed. The question up to which they were leading was this: Were they satisfied, or were they not satisfied, that it was the conduct of the husband that had compelled the wife to leave the husband so as to constitute desertion by him? They must be assumed—because she herself paid very little attention to it—to have considered and discounted the evidence of physical violence and to have realized correctly that the case depended entirely on the question of these sexual acts. It is true, I think, that strictly speaking *Statham* v. *Statham* (1) is no direct authority in

(1) [1929] P. 131.

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connection with this case, but once it is conceded that some corroboration should be looked for of any charge of cruelty, whatever it may be, then I think that the reason underlying the judgments in *Statham* v. *Statham* (1) applies very strongly to this class of case, though the decision itself does not apply directly. The line of reasoning which is implied throughout the whole of the judgments of Greer L.J. and Russell L.J. in that case, is this: If the conduct charged against the husband is a thing which could prima facie only have happened with the assent of the wife there must be some corroboration; and she ought not to be able to come to the Court to complain of something to which she herself has consented. Whichever way it is put, it is plain that the closest scrutiny ought to be given by justices to an allegation of cruelty which at the end of it all is based upon filthy acts of this sort which cannot have occurred without at least the assent of the wife. In that state of things I think the justices were perfectly right in directing themselves that before they were prepared upon such materials as they had to find cruelty constituting constructive desertion, they ought to be very careful not to find it unless they could see some corroboration not merely of the fact that certain things occurred, but that they gave rise to a legitimate matrimonial complaint. I do not think there was such corroboration. The only thing apart from the physical violence, with which I have already dealt, which can be said, in my opinion, to be corroboration of the wife's evidence is the doctor's evidence. The doctor undoubtedly does prove that when she was away from her husband she was better than when she was with him—I am paraphrasing it—and he also proves that some complaint which is entirely undefined was made by her and that her nervous condition at the time when that was made was consistent with the nature of the complaint. That certainly is evidence which provides a necessary step in proving the allegation of cruelty in so far as this case depends on cruelty generally, but as corroboration of the wife's evidence that the husband was guilty of the grosser sort of

(1) [1929] P. 131.

conduct, in my opinion, it comes nowhere near corroboration. I am not going to discuss now the interesting question whether or not a statement made to the doctor that the husband had done this, that or the other thing, would have been admissible as corroboration. It is sufficient to say in this case that no such evidence was tendered or given. We are told nothing whatever about what the nature of the complaint was, and, therefore, though the doctor's evidence is relevant on the question of injury to health, it is no evidence whatever implicating the husband in connection with the alleged acts. Therefore, if corroboration was necessary, I think the justices were right in saying that there was none. They do not, however, in fact found their judgment on that but on what I think is the even stronger alternative ground, that there is no real evidence that it was this sort of conduct which so affected the wife so as to drive her from home. Although I admit, as I have already said, that at first sight their judgment may appear to contain a misdirection to themselves, I am satisfied that in substance they have not misdirected themselves at all. I think they approached this case with full consideration of what the real points were, and, having heard both the husband and the wife, they came to the conclusion, as I think rightly, that the wife had not made out a case that the husband had deserted her.

Bucknill J. I agree. If I construed the judgment of the justices as meaning that they thought they were bound to dismiss the summons because there was no corroboration, I should certainly think the case should be remitted to them; but I do not read it in such a way for two reasons. First of all they refer to the case of *Statham* v. *Statham*. (1) I presume that they were acquainted with the reasoning of that case, and as I read it, I cannot find it laid down anywhere in the judgments of the Lords Justices that there is a legal or statutory necessity for corroboration even in a case of sodomy, and so far as relates to the other sexual acts referred to there, I do not think that the matter of corroboration is even

(1) [1929] P. 131.

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referred to. Secondly, the justices say in their reasons that they are not satisfied that the conduct of the husband compelled the wife to leave him. If they dismissed the summons because they felt bound to dismiss it as a matter of law for want of corroboration, I do not think they would have used the word "satisfied." In my view they weighed all the evidence, they saw the two witnesses, the husband and the wife, and they came to the conclusion that it would be unsafe in the absence of corroboration to find that these sexual acts had been committed.

For these reasons I agree with the President that this appeal should be dismissed.

Solicitors for the appellant: *Woolley & Whitfield, for Maurice E. Pick, Leicester.*

Solicitors for the respondent: *Peacock & Goddard, for Edwards & Frisby, Leicester.*

R. M. M.

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BEVIS *v.* BEVIS.

Divorce — Evidence — Husband's petition — Discretion Statement — Dismissal of Petition—Subsequent Petition by Wife—Claim by Wife to use Husband's Discretion Statement as Evidence against him—Matrimonial Causes (Amendment) Rules, 1934, *r.* 1.

In December, 1932, a husband presented a petition for divorce against his wife on the ground of her alleged adultery in which he prayed the Court to exercise its discretion in his favour and filed the usual discretion statement. The petition was dismissed and it became therefore unnecessary to have recourse to the discretion statement. In December, 1933, the wife presented a petition for divorce against the husband at the hearing of which he did not appear. The wife then sought to use the admissions in the husband's discretion statement as evidence against him of his adultery:—

Held, that inasmuch as it was not the practice of the Divorce Court to reserve discretion statements solely for the use of the Court but to permit access to them by parties to the suits, they were analogous to depositions under s. 214 of the Companies

Act, 1929, and that the evidence obtained by an inspection of them might be treated as admissions and used, if necessary, in other proceedings.

Held, therefore, that the wife was entitled to rely on the husband's discretion statement as evidence of his adultery.

But *held*, that this decision was based on the practice as it existed before January 1, 1934, when the Matrimonial Causes (Amendment) Rules, 1934, came into force, and would apply only to divorce proceedings which had been commenced before that date.

Decision of Langton J. (ante, p. 22) reversed.

APPEAL from a decision of Langton J. (1)

This was a wife's petition, dated December 20, 1933, for dissolution of marriage on the ground of the adultery of her husband.

The parties were married on November 19, 1926, and there was one child born in 1931. The charges of adultery were in relation to prostitutes, one of whom was named in the petition. There was no defence to the petition. The petitioner asked for the exercise of the discretion of the Court in her favour, having herself committed adultery.

The question arising and calling for a report was with reference to the evidence in support of the charges made in the petition. By an earlier petition dated December 9, 1932, Leslie Cubitt Bevis, the husband, had charged Margaret Beatrix Bevis, the present petitioner, with adultery with a named man. L. C. Bevis on the petition now referred to had prayed for the exercise in his favour of the discretion of the Court and had filed a statement showing the grounds of this prayer. On this petition coming on for hearing on December 12, 1933, the case was dismissed with costs ; the President, by whom it was heard, finding the charge of adultery not established. In the course of his judgment the learned President indicated that even if he had been satisfied that the charge against the wife was established, the conduct of the husband in conducing to the adultery charged would have required more close inquiry.

On the present petition the evidence produced of the adultery of the husband consisted in the main, if not entirely, of his

(1) Ante, p. 22.

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admissions of adultery in the discretion statement filed by him in connection with the earlier petition.

The petition was heard before Langton J., who on July 31, 1934, held that the wife was not entitled to use the husband's discretion statement at all, and being of opinion that without that statement there was no sufficient evidence of adultery, he dismissed her petition.

The wife appealed. The appeal was heard on February 22, 1935.

The husband did not appear.

Noel Middleton for the wife. Langton J. was wrong in holding that the wife could not use the husband's discretion statement in the previous suit as an admission of his adultery. Down to January 1, 1935, when the Matrimonial Causes (Amendment) Rules, 1934 (1), came into force there were no Rules of Court dealing with the matter. The practice was based on a direction as to practice laid down by Lord Merrivale (2) following his own decision in *Apted* v. *Apted and Bliss.* (3) In the old Ecclesiastical Courts admissions of adultery were not accepted as sufficient evidence. Under the Matrimonial Causes Act, 1857, the practice as to admissions was stated by Cockburn C.J. in *Robinson* v. *Robinson and Lane.* (4) The practice so laid down has been constantly followed in subsequent cases.

It is not suggested that if the husband had appeared at the hearing of the petition he would not have been entitled to explain the circumstances under which the discretion statement was made. All the wife seeks to do is to use the statement for the naked admission contained in it. In bankruptcy answers to interrogatories given in other cases have been admitted as evidence.

[He also referred to *Grant* v. *Jackson* (5); *Stockfleth* v. *De Tastet* (6); *Ex parte Hall. In re Cooper.* (7)]

[He was stopped.]

(1) See note at the end of this report.
(2) [1930] W. N. 158.
(3) [1930] P. 246.
(4) (1859) 1 Sw. & Tr. 362, 393.
(5) (1794) Peake, 268, 269.
(6) (1814) 4 Camp. 10.
(7) (1882) 19 Ch. D. 580.

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LORD HANWORTH M.R. This is an appeal from the refusal of Langton J. to grant a decree to a wife who petitioned for the dissolution of her marriage and whose husband at the hearing of the petition did not appear. At one time it looked as if the decision to which the Court were asked to come might be of wide importance, but in view of the facts of the case, and of the fact that a new Rule has been made dealing with matters involved in the appeal—a Rule which came into force on January 1 last—the application of the judgment seems to be of somewhat circumscribed and limited area.

The two spouses were married on November 19, 1926. It seems to have been an unlucky marriage. It appears that as early as Easter, 1927, differences had arisen. [His Lordship referred to the facts leading up to the presentation of the petition, and continued:] On December 9, 1932, a petition presented by the husband against his wife charging her with adultery with the co-respondent came on for hearing on December 12, 1933.

In accordance with the practice the husband, recognizing that it would be necessary for him to ask for the exercise of the discretion of the Court by reason of the fact that he himself had been guilty of adultery, complied with the procedure then established. [His Lordship referred to that procedure, and continued:] Counsel for the husband suggested that he should deal first with the evidence on which the main charge in the petition against the wife was founded and that, if he established that there had been adultery committed by the wife and co-respondent, he should then go into the divers matters contained in the discretion statement, which in accordance with the practice had been placed in a sealed envelope. That course was assented to by the President, and when the main issue of the petition had been examined the President held that there had been no adultery committed by the wife with the co-respondent. The main purpose of the petition therefore failed and the petition was dismissed. In those circumstances it became unnecessary to go into the details on which the judge was to have been asked to exercise his discretion.

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A few days later, on December 20, 1933, the wife filed a petition against her husband. It set out the marriage, and then alleged that on divers occasions from a year as far back as 1928 adultery had been committed by her husband. [His Lordship referred to the charges and continued:] The respondent sent a letter saying that he intended to defend the petition, and he entered an appearance, but in fact no answer to the petition was filed, and the husband disappeared and had not been found. It was not known at all what had happened to him, except a surmise that he was residing abroad. On July 11, 1934, the petition came on before Langton J., and it was admitted that the divers acts of adultery alleged to have been committed could not be established by direct proof given on behalf of the wife. Thereupon counsel for the wife sought to rely on the discretion statement which had been presented to the Court in the previous petition which the husband had brought against the wife and which had been dismissed. The judge held that that statement was inadmissible. If it had been admissible I think he showed that he would have been ready to accept it.

The wife herself had had in her petition to admit that there had been lapses on her part which necessitated her asking for the exercise of the discretion of the Court, and the judge indicated that he would have exercised his discretion in her favour if the petition had passed into a region where it was necessary to exercise discretion. He said in his judgment (1): "Indeed the history of the married relations which the wife has detailed to me has confirmed the view which the President formed, and I have very little doubt that in this case the husband did conduce to the adultery to which the petitioner is obliged to confess. For that reason, and for other reasons, I should not have hesitated to exercise my discretion in favour of Mrs. Bevis, if I had been satisfied that adultery had been committed by Mr. Bevis, but the evidence of his adultery stands in a somewhat singular fashion. There is no direct evidence upon which the Court is asked to act. The evidence upon which it is sought to prove adultery

(1) Ante, pp. 22, 24.

consists in the main, if not totally, of admissions of Mr. Bevis, and the principal of those admissions are admissions contained in the statement which he filed in the original suit asking for the exercise in his favour of the discretion of the Court."

Langton J. then said that those admissions made in the statement for the purpose of praying for the discretion of the Court, and for the Court's guidance, were admissions for the purpose of those proceedings only, and that he thought that it was carrying it too high to hold that admissions might be made by a party for the purposes of his own case and afterwards made use of as admissions in other proceedings on a different petition.

The reason why the practice of giving directions in relation to these admissions was introduced is stated in *Apted* v. *Apted and Bliss* (1) by Lord Merrivale, who was then the President. He said (2): "The task of determining with due regard to the interests of the community and of innocent third parties the proper course to be taken where relief is sought under this discretionary power, is facilitated if the material facts are known with reasonable certainty. The practice of the Court is intended to secure this, but experience has shown it to be difficult and in recent years increasingly so. Parties are naturally loath to disclose their own ill-doing."

Lord Merrivale then gave the following direction, dated May 29, 1930 (3): "It is directed by the President, in pursuance of his judgment in the above cause [*Apted* v. *Apted and Bliss*], that when it is intended to ask, at the hearing of a matrimonial cause, that the discretion of the Court be exercised on behalf of either party, the petition (or answer) shall contain a prayer to this effect. It must also be stated, in every application for the registrar's certificate, whether or not the Court will be asked to exercise its discretion on behalf of either party. If the exercise of the discretion is sought, there must be lodged with the application for certificate a statement, signed by such party or his solicitor, setting forth all the facts which require

(1) [1930] P. 246. (2) Ibid. 261.
(3) [1930] W. N. 158.

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the discretion to be exercised, and the grounds upon which such discretion is prayed."

A later direction by Sir Boyd Merriman of April 21, 1934, stated: "It is directed that in future the statement required to be filed by a party in a matrimonial cause asking for the exercise of the discretion of the Court in his or her favour shall be placed and left in the Registry in one of the special envelopes provided for this purpose. The title of the cause must be endorsed on the envelope and the words 'without leave' must be added to the printed words 'not open to inspection'."

In the present case the wife had made the relevant statement in her petition and had complied with the directions laid down. She sought to rely on the document which had been deposited by her husband in the custody of the Court subject to words that it was not open to inspection without leave. We are told that the practice of the Divorce Division is that, if and when a certificate of the registrar is given, although the particulars filed are not open to inspection, the prohibition is subject to leave being given for inspection. If the inspection of the particulars is permitted, though no actual copy is delivered to the other side, facilities are given in many, and probably most, cases, by which some notes of those admissions may be taken by the other side.

Langton J. has held that such a statement coming into being in the circumstances and for the purposes referred to, is not admissible evidence to be used in the case of another petition. But that seems to be going too far. There are cases in which proceedings in one Court are made use of in another Court and in another matter. Attention has been drawn to interrogatories administered in the course of a case which a party is bound to answer. Another case in which the powers of the Court are made use of and the evidence extracted from a party is used in another proceeding is under s. 214 of the Companies Act, 1929. Under that section the Court has power to summon before it "any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property

of the company. (2.) The Court may examine him on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them."

Those depositions might be used against the deponent as admissions. That course was taken in *Ex parte Hall* (1), a matter which came before the Court of Appeal. Sir George Jessel M.R., during the argument in reference to matters of this nature, said (2) : " Any statement made by a man on oath may be used against him as an admission."

It is to be observed that the admissions in the discretion statement are not reserved solely to the Court and never revealed to the other spouse. They are filed for the purpose of the Court. No doubt they are placed in a confidential position, but there is liberty to the other spouse to find out the material facts contained in them. Different considerations might be applied if they were used wholly and entirely by the Court itself alone and in no circumstances revealed to the other party. Having regard to the fact that they are so revealed it would appear that they are analogous to the depositions in s. 214 of the Companies Act, 1929, and the same analogy applies—that the evidence ascertained may be treated as an admission and used, if necessary, in other proceedings. It seems, therefore, that the judge was wrong in refusing to allow the petitioner to rely at all on those facts so revealed. He was entitled to have his attention drawn to them as being admissible evidence.

Now, however, comes a very important matter to which great attention must be paid. Admissions stand in a particular category in the Divorce Court. I do not think I can better state the law than as laid down by Cockburn C.J. in *Robinson* v. *Robinson and Lane* (3), where he said : " Now the evidence . . . . consists entirely of admissions made by the wife herself ; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive

(1) 19 Ch. D. 580. (2) Ibid. 583.
(3) 1 Sw. & Tr. 362, 393.

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evidence on which to pronounce a divorce . . . . and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution ; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind. . . . . Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for." That decision and a number of other cases show that that principle has been adopted and confirmed throughout the history of the Divorce Court.

The judge calls attention to possible dangers which might arise from collusion if such statements could be brought into being and then used in other proceedings—collusive proceedings—and the Court might find itself placed in the unhappy position of having evidence before it which had not been truthfully obtained. Those dangers must be guarded against. They can be guarded against by the judge exercising circumspection and discretion.

It would appear in the present case that, apart from his own signed statement, there was some admissible evidence that the husband had been guilty of adultery. If he had been present at the hearing it would have been possible to ask him some questions in relation to the document which had been filed.

There was evidence admissible before the judge on which he

could have acted. On reading his judgment it appears that he would have been ready to have acted on the admissions, because I think he intended to say that there was confirmatory evidence justifying reliance on them. It is also clear that the judge would have exercised his discretion in favour of this unhappy woman, who had been laid open to temptation, and who had been undoubtedly treated with cruelty by her husband in the sense that he had not cared for her material or moral position.

The right course therefore is to accept the admissions and to grant the decree. We are ready to exercise our discretion in her favour. But I desire to add this caution. Nothing which I have said is intended to indicate that in all cases, or in many cases, an admission can be made use of, or that it can be effective for the purpose of the foundation of a petition, unless the circumstances are such as to confirm the admission. The judge was ready to make use of the admissions on this ground and was satisfied that there was no collusion.

At the beginning of my judgment I said that the matter was not perhaps of wide general application because there has been a Rule (1), which came into force on January 1 last, which deals with these matters. That Rule, which now embodies what before was contained in the directions referred to, will cover the matters in the future. It is only in a case like this, which arose before the Rule came into force, that we have to consider the question with which we have dealt.

The appeal will be allowed.

ROMER L.J. It is with the greatest diffidence that I venture to disagree with Langton J. on a question which is so much mixed up with the practice and procedure of the Divorce Division. But giving the matter the best consideration which I can, I have come to the conclusion that a decree ought to be made in favour of the petitioner in this case. During the argument I ventured to express some doubt as to the validity of the direction given by the President on May 29, 1930, requiring a petitioner who is going to ask the Court

(1) See note at the end of this report.

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to exercise its discretion in his or her favour to lodge what has been called "a discretion statement." It is not necessary to pursue the matter further because, as has been pointed out by the Master of the Rolls, as from January 1, 1935, there are statutory Rules (1) which have now taken the place of the direction, and, whatever question may arise as to those Rules, the question of the validity of the direction as a direction is now merely of academic interest.

What we are really concerned with in this case is whether, where in pursuance of the direction the discretion statement is lodged, the statement is to be deemed to be lodged subject to some implied condition as to the use which may be made of it in the future. Speaking for myself, if I knew nothing at all about the practice of the Divorce Courts, and looking at the direction and nothing else, I confess that I should unhesitatingly have come to the conclusion that the statement was to be lodged in confidence, as a confidential document, and that it was not to be used or looked at unless and until the petitioner asked the Court to exercise its discretion in his or her favour and gave evidence on oath of the facts on which the request was based.

I should have thought, for instance, that if a petitioner at the last moment before the case came on, chose to abandon the petition altogether he or she would have been entitled to say: "Hand me back the statement unopened." But we are told that ever since the direction was given a definite practice has prevailed in the Divorce Division—though whether followed in all cases or not I do not know—to allow the opposite party after the pleadings are closed to inspect the discretion statement, make notes if necessary as to its contents, and to use it, if need be, in cross-examination at the hearing.

That being so, the only conclusion to which I can come is that these statements are lodged not entirely as confidential documents, but as documents of which the Court will make such use as it thinks fit. When, therefore, the husband, the respondent in this case, lodged his statement, he must be

(1) See note at the end of this report.

deemed to have done so with knowledge of the practice, and with knowledge that when the pleadings were closed its contents might, if thought fit and proper, be communicated to his wife. That being so, and the document having been communicated to the wife, it is impossible, as it seems to me, for the husband to say that she must make no use of it as against him, although it contained a plain confession of adultery.

For those reasons, and those which the Master of the Rolls has given, I think that this appeal must be allowed. Looking at the discretion statement which the husband filed no one can have any doubt whatever that the statements in it are true. Neither can there be any doubt that in all the circumstances of the case the discretion which the wife is asking the Court to exercise in her favour should be exercised. I have come to the conclusion that the appeal must be allowed and that a decree nisi must be granted.

MAUGHAM L.J. I only desire to add two observations. The first is that the discretion statement required to be filed is not a statement which involves anything except that which it is the bounden duty of the petitioner in such a case to state to the Court if he proceeds with his petition. Prima facie, a petitioner who has lodged a discretion statement must prove an adultery to have been committed which has not been condoned, and a decree of divorce can only be obtained if the Court exercises its discretion in his favour. That appears from s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, which is a repetition of an earlier provision. It may be observed that the petitioner, the husband, in the previous proceedings, according to the usual practice, stated in his petition that he would ask for the exercise of the discretion of the Court in his favour, which was notice that he had been guilty of adultery and was notice to the wife that, complying with the direction, he had filed or lodged with the application for the registrar's certificate a statement of the matters in respect whereof the exercise of the discretion was prayed.

The second observation is that to my mind it is clear that

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in the first instance the statement was of a confidential character, and that it would have been quite improper to use it in any way on behalf of the wife before the day when, the document having reached the file, her solicitor was permitted to inspect the statement and to take particulars of the facts alleged. I would add this. Suppose the hearing of the husband's petition had taken the ordinary course and he had, after giving his general evidence, proceeded to state, as it was his bounden duty to state with complete frankness, the nature of his divers adulteries during the marriage with a view to enabling the Court properly to exercise its discretion. It is plain that counsel appearing for the wife would be perfectly entitled to cross-examine him on his statement, taking the materials for cross-examination from the particulars obtained from the file, and even to ask to have the statement produced, signed as it would be by or on behalf of the husband, and to ask questions on the facts therein stated.

In those circumstances, I am not able to see that there is anything on ordinary grounds of justice to prevent the wife in the present case making use of the statement, to which she had obtained access in the circumstances which I have mentioned, as admissions of the facts therein contained.

On other matters I do not think it is necessary to add anything to what has been said by the Master of the Rolls and Romer L.J., but as a matter of double precaution I should like to repeat what has fallen from the Master of the Rolls that this is a case which relates simply to the old practice as to statements filed pursuant to *Apted* v. *Apted and Bliss* (1) and in no way concerns the true construction of or the law applicable to the recent Rules (2), which take the place of the old direction, and which came into force as from January 1, 1935.

Appeal allowed.

Solicitor for the petitioner: *Ernest A. Kite.*

(1) [1930] P. 246. (2) See note at the end of this report.

NOTE.

The Matrimonial Causes (Amendment) Rules, 1934 ([1934] W. N. (Misc.) 354), which came into operation on January 1, 1935, now provide :—

" 1. The following heading and Rule shall be inserted after Rule 30 (B) of the Matrimonial Causes Rules, 1924, and shall stand as Rule 30 (C)—

' Discretion.

30 (C)—(1) (i) In every case in which a party prays that the Court will exercise its discretion under the proviso to Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, to grant a decree nisi notwithstanding his or her adultery, the Petition (or Answer) shall contain a prayer to this effect ;

(ii) The application for the Registrar's certificate under paragraph (A) of this Rule shall state whether or not the Court will be asked to exercise its discretion on behalf of the applicant notwithstanding his or her adultery ;

(iii) Where the discretion of the Court is being sought by reason of the adultery of the applicant for the certificate, there shall be lodged, with the application, a statement signed by the party or his or her solicitor setting forth the acts of adultery committed by him or her and all the facts which it is material for the Court to know for the purpose of the exercise of its discretion ;

(iv) Where the discretion of the Court is sought by a party other than the applicant for the certificate such party shall lodge in the Registry a corresponding statement within ten days after the receipt of notice of setting down.

(2) No such statement as is mentioned in the preceding paragraph shall, except by the direction of the Judge, be open to inspection by any other party to the suit.

This paragraph shall not apply to the King's Proctor, whether he is or is not a party to the suit.

(3) Where such statement contains any allegation of adultery or other matrimonial offence on the part of the other spouse which is not referable to any specific allegation in the pleadings, notice of such allegation shall be given to the said spouse, provided that if the Court at the hearing is satisfied that the failure to give such notice is justified the same may be dispensed with.

(4) Neither the said statement nor the said notice shall be admissible in evidence against the party lodging or giving the same respectively except where the party has referred to the said statement or the said notice in evidence given in open Court.' "

W. I. C.

1935
Feb. 14, 15, 18, 19; *March* 5, 15; *April* 5.

THE KATE.

Shipping—Damage at berth—Lease of quay alongside berth by owners to company—Covenant by owners to keep berth in good condition—Breach of covenant—Negligence on lessee's part—Indemnity against owners for damages and costs—Remoteness of damage.

A corporation, which owned the bed of a river and the quays and berths alongside, leased one of the quays to a company and undertook to keep (inter alia) the quay and river berths in good order and condition.

While lying aground at the quay to which she had come to discharge a cargo for the company, the plaintiffs' vessel received damage owing to the defective state of the berth; and, in an action against the corporation as first defendants and the company as second defendants, recovered judgment against both on the following grounds: (*a*) That the corporation's harbour-master knew that the ground alongside the quay was not safe and had taken no steps to put it right, and (*b*) that the company were liable, because, although they did not know of the actual hard ridge which caused the damage, they knew that the berth was in a generally defective state, and took no steps to assure themselves that some repairs, which the corporation had carried out, were satisfactory or to warn the plaintiffs' master that they had not done so.

In a third party claim by the company against the corporation for an indemnity in respect of the damages and costs for which they had been rendered liable:—

Held, that the fact that the company had not fulfilled their duty to the plaintiffs involved no breach of duty to the corporation; that the company were entitled to rely on the covenant by the corporation to keep the berth in good order; that the resulting damage to the vessel for which the company were liable flowed naturally from the breach of covenant; that accordingly the damages were not too remote; and that the indemnity claimed would include the solicitor and client costs incurred by the company in defending the action.

CLAIM FOR AN INDEMNITY.

In an action of damage brought by the owners of the wooden motor vessel *Kate* against the Corporation of Barnstaple and Stanbury & Son, Ld., in respect of injuries sustained by the *Kate* on September 7, 1933, while lying alongside Rolle Quay, in the River Yeo at Barnstaple, the second defendants claimed an indemnity against the first defendants.

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The claim arose by reason of a covenant in the lease of the quay by the corporation to Stanbury & Co. (hereinafter referred to as " the company ") whereby the corporation, as owners of the quay and the berths alongside it, covenanted to " keep the quay, quay wall, mooring posts and river berths in good order and condition." The lease also contained a covenant on the part of the company to comply with the reasonable requirements of the corporation's harbour-master with respect to the berthing of vessels loading or discharging at the premises of the lessees.

The *Kate* was damaged while lying alongside the quay to discharge a cargo of wheat and millers' produce for the company, and the injuries were caused by the uneven state of the berth, there being a marked drop in the level of the ground under the vessel's keelson at a point where it broke, together with a ridge of a more solid character than the general layer of the surrounding mud.

The case is reported only on the third party claim, but the following statement of the facts, so far as material to this report, are taken from the judgment of the learned President delivered on March 5, 1935, on the claim of the owners of the *Kate* against both the defendants. His Lordship gave judgment for the plaintiffs against both parties.

THE PRESIDENT (SIR BOYD MERRIMAN). The shipowners allege, and I find as a fact, that between 10 and 12 noon on September 7, the hog piece and keelson of the *Kate* cracked and broke at a point about two feet forward of the main-mast, with the result that her bottom was set up and considerable damage was sustained; and I find that this damage was caused by the condition of the bed of the river where she was then lying aground.

The corporation are the harbour authority at Barnstaple. It is not disputed that they own the Rolle Quay and have control of the adjacent bed of the river. It is conceded that in relation to vessels trading to the port of Barnstaple, and using the Rolle Quay, they owe the duty of taking reasonable

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care to see that the harbour is in a fit condition for the reception of such ships: see *The Bearn.* (1)

Against the second defendants it is alleged that they are lessees from the corporation and occupiers of that portion of the quay where the *Kate* was lying, with the right to berth and moor vessels thereat, and that they are under the duty imposed upon the occupiers of a wharf who have no control over the adjacent river-bed: see *The Moorcock* (2) and *The Bearn.* (1) [His Lordship held that these allegations were made out, and having dealt with the berthing of the *Kate* and found that she was not, as the corporation alleged, put partly in one berth and partly in another, continued as follows:]

I have next to consider what the defendants respectively knew about the condition of this berth. . . . . The effect of the evidence was, and I so find, that the harbour-master knew perfectly well that the ground opposite the crane was not safe for a vessel to lie on, and that he took no steps whatever to put matters right at that point or to warn vessels of their danger; but that, on the contrary, he had allowed matters to get gradually worse in spite of the added need for care which was imposed by the fact that ships had to lie alongside the crane, the erection of which was contemplated by the lease of February 29, 1932. The crane in fact was erected about two years ago.

I now turn to the position of the company. For some time before the accident the company had been uneasy about the condition of these berths. [His Lordship dealt with the evidence as to complaints which had been made and in particular to three letters of the company's Barnstaple manager. The first, dated August 17, 1933, was in these terms: "We must take exception to the condition in which you keep the berth for the vessels discharging at our Mills. The sand is allowed to silt up very unevenly in places and there is a danger of damage to each vessel and its cargo which has to lie there. We should be glad if you would give this matter

(1) [1906] P. 48. (2) (1889) 14 P. D. 64.

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your prompt attention." On August 19 the company wrote to their head office to report that they had written to the harbour authorities regarding the conditions of the berths, that they had had no reply, but that there were men at work clearing the uneven places, and adding: " when they have finished the berths will be in good condition." On September 13, six days after the accident, the same correspondent wrote to his head office: " the berths for vessels alongside the mills are still in an extremely bad condition and no attempt has been made this week to improve them. Measurements we took to-day show that at three points there are pits to the depth of 2 feet, 18 inches, and 2 feet 6 inches. It is not in a fit state for any vessel to lie there." His Lordship continued as follows :]

That brings me to a question which requires some consideration. Both defendants plead that the master of the *Kate* himself knew of the condition of the berth. In other words, that he was the author of his own injury. He himself says that if he had known of the danger he would not have put his ship there, however much he had been ordered to do so ; and I think that it goes without saying that if, knowing of the actual state of things which caused the damage, he had deliberately put his ship into danger, he could not recover against either defendant. In particular he could not recover against the company, since the duty based on *The Moorcock* (1) and *The Bearn* (2) is a duty to warn.

As Lord Collins M.R. says in *The Bearn* (2) : " There is an implication on the part of the wharf owner that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe he cannot shelter himself by saying that he did not know it. He could shelter himself by shewing that he did take reasonable care to find out ; and, knowing himself how much care he has taken, if that care is not reasonable, and he has not reasonable ground for thinking the berth safe, he is fixed with the obligation of telling the person coming in that he does not know what is the condition of the berth. His liability cannot be put lower

(1) 14 P. D. 64. (2) [1906] P. 48, 76.

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than that. It is the low water mark." But, as Hill J. said in *The Grit* (1) : " When the negligence alleged is a failure to give information, the knowledge or absence of knowledge on the part of the shipowners must be a material circumstance."

Now the *Kate* lay two or three lengths below this berth for about three days on this very voyage. I do not attach very much importance to this fact. There was a certain amount of controversy on the point whether the berth opposite the crane actually dried at low tide. I think there was always a certain amount of surface mud, or mud and water, but I am satisfied that a superficial inspection would not have shown the real state of the ground under the surface. What is more important is that while the *Kate* was lying at the elevator on September 6, an accumulation of sand, projecting above the surface, was observed by the master. He did not admit, though he did not expressly deny, that this had been the subject of a complaint to the company, which in turn was passed on to the corporation by telephone. I think that this was so, and that, though too late to do anything on the 6th, the assistant Borough Surveyor was sent to look into it. I am satisfied, however, that this complaint was of a heap of sand immediately under the stern of the *Kate* as she lay at the elevator, and was probably the result of three vessels having lain there in succession. This heap would be about 15 ft. from the point where the *Kate* broke, and I am satisfied that it had nothing whatever to do with the damage she actually sustained.

But on behalf of the company, it is argued that even if it is true that that particular hump was not the cause of the damage, it shows that the master knew, or at the very least that he had reason to suspect, that the berth was uneven, and therefore knew as much as the company did, and took the risk. The company, on the other hand, had called upon the corporation to put the berths in order. What more, it is said, could they do ?

Now certainly if the master knew of the actual danger, and put his ship on it, and even, I think, if he had reason

(1) [1924] P. 246, 253.

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to suspect the actual danger, and deliberately turned a blind eye to it, he could not throw the risk on the company, or, indeed, on the corporation. But that, in my opinion, is not this case. Equally, if the company had actually known of this particular danger, they could not have allowed the use of the berth until the danger had been removed, without at the very least making it clear that the *Kate* could only lie there at her own risk, with full knowledge of the danger. In fact I find that the master neither knew nor suspected the dangerous condition of things which was the actual cause of the damage. It is true that the company had not informed themselves, by obtaining leave, for example, to take soundings, of the exact details of the defects ; but they knew that the berth was defective and unsafe ; they knew that there had been complaints from other masters ; they knew that the corporation had been doing some work in response to their own representations ; yet they took no reasonable care to assure themselves that the work had been efficiently done, or that the result was satisfactory as regards the berth alongside the crane. At the very least they owed a duty to the plaintiffs to tell their master that this was the extent of their knowledge about the berth. The action that they took about the heap of sand which was seen under the stern of the *Kate*, so far from putting the master on his guard as to the real danger, must to some extent have led him to think that this was the worst he might have to expect. That risk (such as it was) he certainly took, but it turned out that he was justified in taking it. I am not prepared to hold that his knowledge of that particular risk absolves the company from their duty in respect of the berth as a whole, and I find that the company failed to perform that duty.

I find that the corporation failed to take reasonable care to see that the berth in question was in a fit condition ; and having failed in that duty, I also find, though I do not know that this carries the matter any further, that they neglected to warn the master of the *Kate* that the berth was, to their knowledge, unsafe. I therefore give judgment against both defendants, with costs.

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The arguments on the company's claim against the corporation for an indemnity in respect of the damages and costs for which the company would be liable under this judgment were heard on March 15.

Cyril Miller for the company. Although the company have been found to blame for a negligent failure to assure themselves that the work on the berth had been efficiently done or to warn the master of the *Kate* of their lack of knowledge, the corporation cannot rely on that finding of negligence. The corporation were under a continuing obligation to keep the berth fit, and the company were entitled to rely on the corporation carrying out their contract : the case is governed by the principles stated in *Mowbray* v. *Merryweather* (1) and *Scott* v. *Foley, Aikman & Co.* (2)

[THE PRESIDENT : In each of those cases there was a warranty as to facts and an express finding that this was relied on.]

The company owed no duty to the corporation to ascertain whether the covenant was being complied with, but they in fact relied on its being carried out ; the corporation's men had been working on the berth and the company did not know that the corporation were not fulfilling their obligations. The company had no knowledge of the particular defect—namely, the hard ridge of sand which was not, on a superficial inspection, different from the surrounding mud ; and the heap of sand, about which complaint had been made, was in fact innocuous and had nothing to do with the damage to the *Kate*. In *Payne* v. *Rogers* (3) it was held that where a third party was injured owing to a defect in a floor of a house which the landlord had to bear the expense of repairing, although the tenant was prima facie bound to repair, the third party could sue the landlord direct, as the tenant would have a remedy over, and to hold otherwise would encourage circuity of action : see also *Cavalier* v. *Pope* (4), where, although in a somewhat similar case, it was held that the decision in *Payne* v. *Rogers* (3) was inapplicable, the reasoning

(1) [1895] 2 Q. B. 640.
(2) (1899) 5 Com. Cas. 53.
(3) (1794) 2 H. Bl. 350.
(4) [1905] 2 K. B. 757 ; [1906] A. C. 428.

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is strongly in favour of the company's contention, for the ground on which the plaintiff failed was that she was not a contracting party.

Here all the damages flow directly from the corporation's breach of covenant, and the company are entitled to the indemnity claimed.

[Reference was also made to *Nelson* v. *Liverpool Brewery Co.* (1)]

R. F. Hayward and *Vere Hunt* for the corporation. The company were guilty of a separate and independent tort; they did not ascertain the actual state of the berth and they did not warn the plaintiff's master, although they knew that the berth was in general in a defective state. Accordingly, the breach of duty by the corporation was not the cause of the company's liability, and the damages in respect of which the indemnity is claimed are too remote; they do not flow from the breach of covenant, for the chain of causation was broken by the company putting the vessel on the berth in spite of the knowledge they had of its condition. They had complained about it, and knew that the corporation had not levelled and could not level it before the *Kate* went there.

[THE PRESIDENT. How do you distinguish *Mowbray* v. *Merryweather* (2) ?]

Both in that case and in *Scott* v. *Foley, Aikman & Co.* (3) the parties in the position of the company here were entitled to rely on the warranty and in fact did so. Here it is not even pleaded that in putting the *Kate* on the berth the company were relying on the corporation having fulfilled their covenant, and in fact they did not rely on it, for they knew that the corporation had not carried it out.

[THE PRESIDENT. It may be that they can rely on a covenant, for there may be a distinction between breach of a warranty and breach of a covenant which is a continuing obligation.]

The company were guilty of negligence qua the corporation in that they acted unreasonably; it must be implied that they will act reasonably, and their duty clearly was not to invite the

(1) (1877) 2 C. P. D. 311. (2) [1895] 2 Q. B. 640.
(3) 5 Com. Cas. 53.

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Kate to the berth under the existing circumstances, or at least to warn her master. In any event, even if the corporation have been guilty of a breach of duty to the company, the latter are under a duty to minimize the damages, and on this ground also should not have unloaded the vessel where they did, even if such a course would have involved extra expense. Further, having regard to all the circumstances, it was unreasonable for the company to defend the plaintiffs' action.

Cyril Miller replied.

R. E. Gething, for the plaintiffs, took no part in the arguments on this part of the case.

Cur. adv. vult.

April 5. THE PRESIDENT (SIR BOYD MERRIMAN) read the following judgment :—

I have already delivered judgment in this case as between the plaintiffs and the two defendants, but I have now to decide the third party claim by the company against the corporation.

At the conclusion of the arguments in connection with the plaintiffs' claim an attempt was made to argue the third party claim ; but it soon became apparent that it was impossible to deal with this satisfactorily until I had expressed my reasons for holding that the plaintiffs were entitled to recover against both defendants. The case was therefore argued after the parties had had time to consider my first judgment, and upon the basis that that judgment was accepted for the purpose of the argument. I should like, in passing, to express my obligations to counsel for the admirable way in which this case has been argued throughout.

This present judgment, therefore, is to be read in light of my earlier judgment, which is to be taken to be incorporated herein at length, though it may be necessary to summarize the effect of it for the purpose of making my present judgment plain.

Both defendants have been found guilty of negligence towards the plaintiffs, but I need scarcely say that the third party claim is not based on any attempt to obtain contribution

as between one tortfeasor and another, but is based upon the covenant in the lease, dated February 29, 1932, whereby the corporation covenanted with the company to keep the quay, quay wall, mooring posts and river berths (including the berth at which the *Kate* was injured) in good order and condition during the said term. The company allege that the damages they have sustained were occasioned solely by the breach of this covenant. The corporation, on the other hand, deny that they committed any breach of covenant and they incorporate in their defence the allegation made in para. 4 of their defence to the plaintiffs' claim that the damage was due to the *Kate* being improperly placed on the morning of September 7, 1933, without the knowledge and permission of the corporation or their servants, in a position abreast of the water discharge from the flour mills and partly in one berth and partly in another berth. On the question of damage the corporation also argue, as they are entitled to do, although there is no specific pleading with regard to damages, that even assuming there was a breach of covenant the damages claimed are too remote.

In my former judgment I have already disposed, adversely to the corporation, of the issue raised by para. 4 of their defence to the plaintiffs' claim, and have found that the place where the *Kate* was lying was a recognized berth and that it was not in a reasonably safe condition owing to the negligence of the first defendants. It follows, therefore, that I have already found that they were guilty of a breach of the covenant in respect of this very berth ; and I do not propose to say anything further on that point. The real substance of the argument of the corporation is that the liability of the company for the damage sustained by the *Kate* is the result of the independent tort of which they have been found guilty, and that, regarded as a consequence of the corporation's breach of covenant, the damages are too remote ; and secondly that in any event the damages ought not to include costs incurred by the company in fighting the action. This argument was put in several ways, but it always came back to the question of remoteness of damage.

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Now I have found that the corporation knew perfectly well that the berth was unsafe and had allowed things to get gradually worse. On the other hand, in the middle of August, I have found that the company were uneasy about the state of the berths generally, and had called upon the corporation to put them in order ; but as the letter from their Barnstaple office to the head office of August 19 shows, they were reassured by the fact that, whether in response to a wrongly directed letter of August 17 or not, the corporation were doing work upon the berths, and to quote their own words : " when they have finished, the berths will be in good condition." That remained, so far as any written record is concerned, the state of mind of the company's representatives at Barnstaple until the master of the *Kate* complained on September 6. That complaint, however, related to a particular heap of sand under the *Kate's* stern as she lay alongside the elevator, which I have found had nothing whatever to do with the damage.

In other words, though the company did not know of the actual defect which caused the damage to the *Kate*, they knew that there had been grounds for complaint that the berths were defective and unsafe ; they knew that the corporation had been doing some repair work as the result of their own representations to this effect ; but I found nevertheless that the company took no care to assure themselves that the results were satisfactory, or to inform the plaintiffs, in these circumstances, that they had not done so ; and I have held them guilty of negligence in respect of this failure to warn the plaintiffs.

Mr. Hayward argues for the corporation that the damage to the *Kate* resulted solely from this negligence on the part of the plaintiffs. He says that it is impossible that it should have been in the contemplation of the parties that the company would put a ship on the berth opposite the crane without warning the master of the extent of their own knowledge, or lack of knowledge as the case might be, of the state of the berths. In particular he argued that this could not be so, since the corporation had promised the company to remove the heap of sand on the morning of September 7, a thing which it was impossible to do if the *Kate* was moved to the crane.

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I will deal with this latter argument first. It would be a formidable argument if there were any ground for supposing that such delay in moving the *Kate* as would have enabled the corporation to remove what I have found to be the irrelevant heap of sand, would have prevented the damage which actually occurred. But I am satisfied that this would not have been so. At most it could only have postponed the damage ; though, as the *Kate* did not take the ground until well after 9 o'clock, this heap could easily have been removed in time to allow her to be moved on the same tide. The actual removal of the heap of sand would have had no effect whatever in minimizing the real danger, though it might possibly have aggravated it by giving her even less support forward than she had. I think Mr. Miller is right in arguing that the failure to wait for the corporation to clear the heap of sand may have been a causa sine qua non, but was not a causa causans. It amounts to no more than this : that it enables the corporation to say that the *Kate* might not have been placed upon the point of danger at the exact moment when she was so placed, but otherwise it would have had no effect upon the matter whatever.

But it remains to deal with the main point, that it was the company's negligence in allowing the *Kate* to move to the dangerous berth, without warning, which was the cause of the damage. In my opinion this argument is disposed of by *Mowbray* v. *Merryweather*. (1) In that case the defendant, the owner of a steamship, had undertaken to provide the plaintiffs, a firm of stevedores, with the gear reasonably fit for the purpose of discharging a cargo. Instead, he supplied a chain so defective that it broke while being used in discharging the cargo, whereby a workman of the plaintiffs was seriously injured. That workman recovered damages against the stevedores, under the Employers' Liability Act, by reason of their negligence in failing to discover the defect, as it was held they might have done by the exercise of reasonable care. The very argument used in this case, mutatis mutandis, was addressed to the Court of Appeal. In the

(1) [1895] 2 Q. B. 640.

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course of his judgment Lord Esher said that there was a contract, a breach of it, and therefore a cause of action for which, at any rate, nominal damages would be recoverable. He added that the workman could not have recovered unless, as between himself and the stevedores, the stevedores had been guilty of want of care, but that the stevedores argued that they were not bound to examine the chain because the defendant had warranted it sound, and that they had a right to rely on the warranty and did rely on it; and that the defendant could not rely on a duty to use due care which was owed not to him but to the plaintiff workman; and Lord Esher held that this contention was correct, and that the plaintiffs owed no duty to the defendant to examine the chain before allowing it to be used by their workmen, the only duty they owed in that respect being to the workman. He also approved expressly the judgment of Martin B. in *Burrows* v. *March Gas and Coke Co.* (1), which judgment seems to me to be in point in the present case.

One of the reasons given in support of this decision of the Court of Appeal was that, as in this case, the circumstances were such that the original plaintiff could have recovered direct against the then defendant.

In *Scott* v. *Foley, Aikman & Co.* (2) the claim was founded on a breach by the owner of a warranty in a charterparty that the vessel was "in every way fitted for the voyage and service and to be so maintained by the owners." The breach alleged was the defective condition of an iron ladder leading to the hold, and it was held that the plaintiff charterer's liability to the stevedore was the natural consequence of the defendant's breach of warranty notwithstanding that his own negligence in failing to inspect the ladder gave rise to the claim of the stevedore. It will be observed that the warranty was a warranty both that the ship was fit for the service and that it would be so maintained.

Now as regards both these cases there is, of course, a difference between a covenant to keep a thing in repair and a warranty that the thing is at a given time in a particular

(1) (1870) L. R. 5 Ex. 67. (2) 5 Com. Cas. 53.

state of fitness or repair; but it seems to me that there is no distinction in principle. The question in either case is whether the damage sustained is the natural consequence of the breach of contract, notwithstanding some independent negligence on the part of the plaintiff.

I ought, however, to add that Mr. Hayward also took the point that even assuming that the present case was governed by the cases I have mentioned, the company had nowhere pleaded or proved that they put the *Kate* on the berth in reliance on the covenant. With regard to this I need only say that the identical argument was used and rejected in *Mowbray* v. *Merryweather* (1) and that in *Scott* v. *Foley, Aikman & Co.* (2) Bigham J., as he then was, found no difficulty in holding, apart from any specific evidence, that the warranty was obviously relied upon. I so hold in this case. The company had actually called on the corporation to fulfil their covenant, and were obviously reassured to some extent by the work which they had seen the corporation doing. In my opinion the fact that the company did not fulfil their duty to the plaintiffs involved no breach of duty to the corporation: and I hold that, notwithstanding their negligence towards the plaintiffs, they are entitled to say as against the corporation that the resulting damage to the *Kate* flowed from the breach of covenant.

There remains the question of the costs. It seems to me that when the corporation had pleaded, not only as against the plaintiffs but as against the company, that the *Kate* had been permitted to lie at a place which was wholly unauthorized as a berth, it was practically impossible for the company to submit to judgment. There is abundant authority, including the case of *Scott* v. *Foley, Aikman & Co.* (2) and the cases there cited, that costs reasonably incurred in defending a claim should be included in the damages. I hold that these costs were reasonably incurred in the circumstances, and if costs are recoverable at all Mr. Hayward very rightly admitted that there was no distinction to be drawn between the party and party costs and the solicitor and client costs. For these

(1) [1895] 2 Q. B. 640. (2) 5 Com. Cas. 53.

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reasons I give judgment for the indemnity claimed with costs.

Solicitors for the plaintiffs: *W. & W. Stocken.*

Solicitors for the first defendants: *Vandercom, Stanton & Co., for J. H. L. Brewer, Town Clerk, Barnstaple.*

Solicitors for the second defendants: *Richards, Butler, Stokes & Woodham Smith.*

E. C. M. T.

1935
Feb. 25.

In the Estate of EDWARD ATHELSTANE LEWIS POWELL.

Probate—Settled Land—Untraced Representation to Settlor—Will of subsequent testator interested under settlement—Probate of Will save and except Settled Land—Land subject to rentcharge—Absolute interest of testator subject to rentcharge—No representation to testator in respect of land so settled—Revocation of limited probate to Executors of testator—Fresh grant of general probate to Executors of testator passing over untraced representatives of Settlor—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (v.); *s.* 30, *sub-s.* 3—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 23, *sub-ss.* 2, 3—*Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 155, 162—*Administration of Justice Act,* 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 9.

G. E. J. P. died in 1882 and the chain of representation to his estate was not known and could not be ascertained without considerable expense. E. A. L. P. the testator died on March 27, 1930, and the present applicants, who were his executors, had taken probate of his will in due course save and except land vested in the testator which was settled previously to his death and not by his will and remained settled land notwithstanding his death. The testator was interested in land settled by the will of G. E. J. P. as follows:—

(A) He was tenant for life for the purposes of the Settled Land Act, 1925, of a portion of the N. estate subject to a compound settlement consisting of the will of G. E. J. P. together with an indenture of resettlement of the N. estate dated September 25, 1909.

(B) He was absolute owner of certain portions of the N. estate, which by reason of a rentcharge upon them continued to be settled land after his death. These portions were included in a settlement created by the will of G. E. J. P. but were not subject to the compound settlement or the resettlement. They were therefore the subject of a separate settlement.

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(C) Certain portions of the N. estate of which the testator was absolute owner were subject to the same conditions as to title as B, but the testator had exonerated these latter from the incidence of the rentcharge as between the various portions of the estate, but he could only do so in so far as the income from both B and C was adequate to meet the rentcharge. As regards the burden of the rentcharge as a whole both B and C remained subject to it in favour of the chargee.

Of these interests in settled land of the testator all three remained subject to the rentcharge, the object of which was to provide an annuity to the still surviving widow of G. E. J. P., and apart from the operation of the Settled Land Act, 1925, s. 30, sub-s. 3, for the purposes of that Act, there were originally no trustees of any of these interests of the testator under the settlement created by the will of G. E. J. P. On July 22, 1931, G. R. P. S. and G. A. A. W. had already as trustees of the compound settlement and resettlement obtained a grant of special probate to the testator as his special executors limited to settled land, vested in him as tenant for life under the compound settlement and resettlement. Probate of the testator's will having excluded settled land there was no representation in respect of the settled land of which he was absolute owner which remained settled land because of the existence of the rentcharge. On the application of the general executors of the will of the testator:—

The Court revoked the earlier probate and granted general probate to them save and except settled land, of which special executors had already been appointed by the grant dated July 22, 1931, under the authority of the Judicature (Consolidation) Act, 1925, s. 155, without citing the personal representatives (if any) of the settlor (G. E. J. P.).

THE testator, Edward Athelstane Lewis Powell, late of Nanteos in the county of Cardigan, died on March 27, 1930, having by his will dated May 20, 1924, appointed Frederick Hubert Jessop, of Aberystwith, solicitor, and Llewellyn Jones, of Aberystwith, surveyor, executors, to whom on August 28, 1930, probate was granted "save and except land vested in the said deceased which was settled previously to his death and not by his will and remains settled land notwithstanding his death." The testator appointed no special executors as to settled land. He died solvent. The testator was interested at his death in land settled by the will of George Ernest John Powell, a former owner of the Nanteos estate, who died on October 17, 1882. The representation of the estate of the said George Ernest John Powell was as follows. Probate of his will

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with two codicils was granted on January 23, 1883, to Charles Harris Hodgson, the sole executor of the said George Ernest John Powell. Charles Harris Hodgson died on February 1, 1888, and probate of his will in turn was in due course granted to Mary Louisa Hodgson, his executrix. It was not now known and could not be ascertained without searches and inquiries entailing considerable expense, what chain of representation to George Ernest John Powell (if any) existed, and consequently whether any personal representatives of the said George Ernest John Powell could be found who would be willing to continue representation.

Apart from s. 30, sub-s. 3, of the Settled Land Act, 1925, there were no trustees for the purposes of the Settled Land Act of the settlement created by the will of George Ernest John Powell.

A material provision by the will of the said George Ernest John Powell was the creation of an annuity now amounting in the events which had happened to 250*l.* secured by an annual rentcharge on the whole of his freehold estate in favour of Dinah Thomas Whildin, his widow, who had since remarried and was still surviving. The testator's interests in the estate of George Ernest John Powell were as follows: He was tenant for life for the purposes of the Settled Land Act, 1925, of a portion of the Nanteos estate subject to a compound settlement consisting of the will of the said George Ernest John Powell together with an indenture of resettlement of the said estate dated September 25, 1909. George Rice Pryse (now George Rice Pryse Saunders) and John Albert Alexander Williams were at the death of the testator trustees of the resettlement in question and also of the compound settlement, and on July 22, 1931, a grant of special probate of the will of the testator was made to them as special executors as to settled land vested in the testator under the will and codicil of G. E. Powell and the resettlement limited to settled land. The testator was absolute owner of certain other portions of the Nanteos estate, and these latter portions being subject to the rentcharge in favour of Dinah Thomas Whildin were at the death of the testator,

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and continued after his death to be settled land within the Settled Land Act, 1925, s. 1, sub-s. 1 (v.). The latter portions of the Nanteos estate besides being subject to the rentcharge, were also included in the settlement created by the will of George Ernest John Powell, but they were not subject to the resettlement or the compound settlement. They, therefore, formed the subject of a separate settlement of which there were no trustees. Some of the portions of the estate of which the testator was absolute owner had been exonerated by him from the incidence of the rentcharge by a deed poll under his hand dated September 24, 1909, so far only as the income from all such portions was adequate to meet the complete incidence of the rentcharge. The final result at the death of the testator of the various dealings and dispositions up to that date in connection with the estate of George Ernest John Powell was that there were then vested in the testator :—

(A) Settled land being property settled by the will of George Ernest John Powell included in the resettlement of 1909 and subject to the rentcharge. The testator was tenant for life of this property and George Rice Pryse Saunders and John Albert Alexander Williams were his special executors with reference to it.

(B) Land settled by the same will but not included in the resettlement. This property was subject to the rentcharge. The testator was absolute owner, but having regard to the rentcharge it remained settled land after his death. As such it had been specially excluded from the general grant of probate dated August 28, 1930, of his will, and in respect of it there was therefore no representation.

(C) Land settled by the same will but not included in the resettlement. The testator was absolute owner of this property, which he had exonerated from the rentcharge so far as he was able namely, as between it and the other properties charged; but it nevertheless remained liable to the claim of the annuitant and remained settled land after his death, and in all respects as regards representation it was on a footing similar to (B).

As the special executorship to the testator's estate of

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George Rice Pryse Saunders and John Albert Alexander Williams was limited to the resettled property of which the testator was tenant for life, and did not include that previously described as the subject of separate settlements of which he was absolute owner, and as the general probate of the testator's will excepted all settled land, his general executors were advised that a fresh grant must be applied for limited to the settled land subject to the rentcharge, but not included in the resettlement or in the grant of special executorship to George Rice Pryse Saunders and John Albert Alexander Williams. The motion was for a grant of probate of the will of the testator to his general executors, namely, F. H. Jessopp and L. Jones, as special representatives in respect of settled land vested in the testator under the settlement created by the will of George Ernest John Powell limited to the settled land without citation of the personal representatives (if any) of the said George Ernest John Powell or for such order as the Court might think fit.

Noel Middleton in support of the motion. There are no trustees of the settled land under the will of George Ernest John Powell, and by the operation of the Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 30, sub-s. 3, his personal representatives are trustees for the purposes of the Act of the settlement created by his will until other trustees are appointed.

The chain of representation under his will, however, so far as is known, is broken, and it is desired to avoid expense and delay in tracing it. As regards settled land (not settled by his will and remaining settled after his death) a testator has no independent choice of executors as distinguished from his general executors: Wolstenholme & Cherry's Conveyancing Statutes, ed. 12, pp. 1439 to 1445. The present application is in part rendered necessary in order to clear off the representatives (if any) of George Ernest John Powell, who cannot under the circumstances be called on to accept or refuse a grant, and further to obtain a further grant of probate of the will of the testator limited to such part of the settled land passing under the will as was not included in the grant of

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July 22, 1931, to George Rice Pryse Saunders and John Albert Alexander Williams. Subject to the clearing off of the representatives of George Ernest John Powell, the Administration of Estates Act, 1925, s. 23, sub-s. 2, permits the appointment of a special personal representative in respect of the settled land jointly with or in place of the original representative; but by a direction of the President dated July 31, 1928, before this can be done a direction permitting it must be obtained in Chancery Chambers (1); *In the Estate of John Talbot Clifton.* (2) Apart from the cumbrous nature of this circuitous proceeding, the question would remain whether "special considerations" exist under s. 23, sub-s. 3, to enable the Court to appoint persons who are not trustees of the settlement, and further than that the form to be used on the application as set out in Wolstenholme & Cherry's Conveyancing Statutes, ed. 12, pp. 1550, 1551, does not fit in with what is sought by the present application. The Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, deals with administration and not with probate. Under the Judicature (Consolidation) Act, 1925, s. 155 (3), there is power to grant representation of real estate only apart from personalty; under that section it is submitted that a grant may be made to Jessop and Jones either by revoking their existing grant of probate or limiting a fresh one so as to include land settled by the will of George Ernest John Powell vested in the testator, to which there is at present no representation.

THE COURT (LANGTON J.) made the following order (4) That the grant of probate of the last will and testament of the

(1) For text of Direction see Wolstenholme & Cherry's Conveyancing Statutes, ed. 12, pp. 1550, 1551.

(2) [1931] P. 222.

(3) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 155, sub-s. 1: "Probate or administration in respect of the real estate of a deceased person, or any part thereof, may be granted either separately or together with probate or administration of his personal estate, and may also be granted in respect of real estate only where there is no personal estate, or in respect of a trust estate only, and a grant of administration to real estate may be limited in any way the Court thinks proper."

(4) As drawn up.

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deceased issued on August 28, 1930, be revoked and that probate of the said will bearing date May 20, 1924, save and except the settled land settled by the will and codicil of George Ernest John Powell proved on January 23, 1883, coupled with the indentures of settlement dated September 25, 1909, be granted under the authority of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 155, to the executors thereof without clearing off the personal representatives (if any) of the settlor of the other settled land vested in the said deceased.

Solicitor: *Newton G. Driver, for Smith, Davies & Jessop, Aberystwyth.*

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March 27, 28;
April 17.

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(COWAN INTERVENING).

COWAN OTHERWISE YOUELL *v.* COWAN.

Nullity of Marriage—Bigamy—Previous proceedings as to validity of previous marriage—Settlement of previous proceedings—Estoppel—Effect of assertions by both of two parties with common knowledge distinguished from estoppel.

A man petitioning for a decree of nullity of an English marriage on the ground of the survivorship of a former husband of the woman to whom, as the petitioner alleged, she had been married previously in Scotland was met by a plea of estoppel in pais. Particulars of the alleged estoppel were that in an earlier suit in this Court by the former husband of the woman for divorce from her on the ground of her adultery with the present petitioner, the petitioner as co-respondent in that suit had expressly adopted a plea of the woman denying the validity of the Scotch marriage, and further that in certain proceedings then taken by the woman in the Scotch Court seeking a declaration that she and the petitioner were husband and wife and praying that the former husband of the woman should be "put to silence in respect of false and calumnious allegations by him that he was married" to the woman, the petitioner had not only been a party to those proceedings as "curator and administrator" of the woman and

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" for his own interest in the premises " but had also been a party to the settlement of them, resulting in the former husband of the woman admitting that there had been no legal marriage in Scotland between him and the woman and withdrawing his suit and subsequently marrying another woman in England.

Applying to these facts the doctrine of estoppel as restated and expanded in *Nippon Menkwa Kabushiki Kaisha* v. *Dawsons Bank Ld.* (1935) 51 Ll. L. Rep. 147, 150:—

Held, that none of the requirements for an estoppel had been fulfilled. Although the petitioner had adopted the plea by the woman denying the validity of the Scotch marriage he had not done so with intention to mislead the woman, whose knowledge of the facts was greater than his own. Both parties were simultaneously making the same statement for a common purpose, and neither could be estopped as against the other by the making of it. Finally, in the proceedings taken by her in the Scotch Court the woman relied upon her own knowledge of the facts as to the alleged Scotch marriage in which the petitioner had no part, and if she had acted to her own detriment she did not do so on the faith of any statement by the petitioner.

Quaere whether the decision of an issue as to the validity of a marriage which involves status and is of public interest can be governed by an estoppel inter partes.

NULLITY OF MARRIAGE. Actions raising the issue of the validity of the same marriage tried together.

By a petition dated June 4, 1934, Geoffrey Michael Elliott Square sought a decree of nullity of a ceremony of marriage celebrated between him and Valérie Jean Bewicke, the respondent, on May 15, 1915, at a register office in England, on the ground that one Aubrey M. Cohen, to whom on July 25, 1912, Valérie Jean Bewicke had been lawfully married by declaration according to Scotch law at Sliddery, Isle of Arran, Scotland, was still living. The respondent described as Valérie Jean Square formerly Bewicke otherwise Cohen by her answer set up the marriage which the petitioner sought to have annulled as a valid one and denied that she had lawfully been married to Aubrey M. Cohen, and further pleaded that Geoffrey Michael Elliott Square was estopped from alleging a marriage between the respondent and Aubrey M. Cohen by reason of the facts that on January 21, 1920, Aubrey M. Cohen had filed a petition in this Court praying for the dissolution of his alleged marriage with the respondent on the ground of her adultery with Geoffrey Michael Elliott

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Square after going through the ceremony of marriage with Square which Cohen alleged to have been bigamous.

Whereupon, (1.) the respondent had answered in that suit denying that her marriage to Geoffrey Michael Elliott Square was bigamous and denying that she had been married to Cohen, and Geoffrey Michael Elliott Square had also answered adopting the pleas of the respondent; (2.) that on February 16, 1920, the respondent, as the wife of Geoffrey Michael Elliott Square and with his consent and concurrence as her "curator and administrator" and "for his own interest in the premises," had issued a summons in the Court of Session in Scotland against Aubrey M. Cohen, claiming a declaration that the respondent was the wife of Geoffrey Michael Elliott Square and that Aubrey M. Cohen ought to be "put to silence in respect of false and calumnious allegations by him that he was married to the respondent"; (3.) that the proceedings in the Court of Session had been settled on the terms that Aubrey M. Cohen admitted that no marriage ever subsisted between him and the respondent, and undertook to withdraw his petition dated January 21, 1920, and that both parties mutually undertook not to assert a marriage in future; and finally (4.) that relying on the foregoing facts on January 7, 1921, Cohen under the name of Cowan was lawfully married to Ada Mildred Youell at a register office in England. Aubrey M. Cohen now styled Cowan intervened in the first suit, and on September 5, 1934, filed an answer adopting the case of the respondent. In a second suit Ada Mildred Youell sought a declaration against Cowan that the ceremony of marriage celebrated on January 7, 1921, between them was null and void on the same ground, i.e., the former marriage of Cowan. Cowan by his answer in this suit denied that there had ever been a valid marriage between Mrs. Square and himself.

The respondent in the first suit had a Scotch domicil of origin, and in 1909 married a man named Bewicke. In 1912, when a widow, she met Aubrey M. Cowen or Cowan and lived with him for some time as his mistress. On July 25, 1912, the respondent and Cowen or Cowan went through a ceremony in Scotland which the Court was satisfied constituted an

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irregular but legal Scotch marriage affording the present petitioner good ground for his claim of nullity of his subsequent marriage with the respondent.

[On expert evidence the Court found the validity of the Scotch marriage established, and the only matter calling for report arose on the plea of the respondent that the petitioner was estopped by his conduct towards the respondent from asserting the factum of the previous marriage of the respondent and Cohen or Cowan.]

F. L. C. Hodson for the respondent and Cowan. This is a case of estoppel in pais. The petitioner was a party to the settlement of the Scotch proceedings in 1920, and his consent to and concurrence in them prevents him from being heard to allege the marriage of the respondent and Cowan: *Pickard* v. *Sears*. (1) Conduct to constitute estoppel may consist of mere negligence or omission: *Freeman* v. *Cooke*. (2) In *Aldridge* v. *Aldridge* (3) an agreement not to sue for nullity on the ground of incapacity to consummate the marriage was upheld by Lord Hannen. In the more recent case of *Woodland* v. *Woodland otherwise Belin* (4) the husband had allowed to go by default a decree for restitution of conjugal rights containing an express finding that the parties were husband and wife. His subsequent suit for nullity on the ground of bigamy was dismissed on the ground of estoppel. The learned judge (Hill J.) relied for this principle on *Wilkins* v. *Wilkins*. (5)

[He also referred on the question of estoppel arising from agreement not to sue or recriminate to *Rose* v. *Rose* (6) and *L.* v. *L.* (7)]

Doughty K.C. (*Bush James* with him) for the petitioner. *Wilkins* v. *Wilkins* (5), upon the authority of which case *Woodland* v. *Woodland otherwise Belin* (4), cited against us, proceeded, was a very different case. There the verdict of a jury was subsequently falsified by the survivorship of a

(1) (1837) 6 Ad. & Ell. 469, 474.
(2) (1848) 2 Ex. 654.
(3) (1888) 13 P. D. 210.
(4) [1928] P. 169.
(5) [1896] P. 108.
(6) (1883) 8 P. D. 98.
(7) [1931] P. 63.

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spouse supposed to be dead, and the real question arising was the remedy for a miscarriage of justice. No case can be found of estoppel preventing a plea that a ceremony of marriage has been a nullity, however extreme the misrepresentation of its validity (and we say that Square was not guilty of misrepresentation). If a ceremony is void ab initio, the Court cannot be prevented from so deciding by the act or default of a party to a previous proceeding. It is a question of status, and personal contentions of the parties cannot weigh against the public interest. In *Miles* v. *Chilton otherwise Miles* (1) it was decided that the misconduct, however gross, of a party proceeding for nullity on the ground of bigamy is no bar, marriage being more than a civil contract the illegality of which may prevent a party from proceeding. Moreover it cannot be said that the respondent was induced by the conduct of the petitioner in the proceedings in the Scotch Court to alter her position, which is the very essence of estoppel.

[LANGTON J. referred to *Compania Naviera Vasconzada* v. *Churchill and Sim* (2) and *Nippon Menkwa Kabushiki Kaisha* v. *Dawsons Bank.* (3)]

Bayford K.C. (*Walter Frampton* with him) for Mrs. Cowan (petitioner in the second suit).

Cur. adv. vult.

April 17. LANGTON J. [having found the Scotch marriage established, continued :] The remaining point concerns the estoppel. This was argued with pertinacity and ingenuity by counsel for the respondent, but when the facts are viewed as a whole they are far from supporting a case of estoppel. The suggested estoppel is an estoppel in pais, and the first step can be stated with some force against Mr. Square. In the English proceedings which Mr. Cowan commenced in 1920 Mr. Square put in a plea to the effect that the respondent was not validly married in Scotland, and in the Scotch proceedings, to which he was technically at least a party,

(1) (1849) 1 Rob. Ecc. 684, 694. (2) [1906] 1 K. B. 237.
(3) 51 Ll. L. Rep. 147, 150.

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he also denied the validity of the marriage. He is to-day asserting the reverse, and grounding a suit for nullity upon the very fact which he denied in 1920. Upon this aspect of the matter it is urged on his behalf that from 1915 until 1933 he did not know of the documents signed in Arran (part of the proof of the Scottish marriage), but one can have little doubt that had he known of them even in 1920 he would equally have denied the Scotch marriage. But I do not think that the knowledge or ignorance of the existence of those documents or the question whether his conduct towards the respondent is blameworthy or not is in any way decisive of the point as to estoppel. Counsel for the respondent relied upon the well known classical statement as to estoppel in *Pickard* v. *Sears*. (1) The dictum there of Lord Denman C.J. is (1): "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That was cited and approved by Parke B. in *Freeman* v. *Cooke*. (2) I have also refreshed my memory of the admirable exposition of the law upon this subject contained in the judgment of Channell J. in *Compania Naviera Vasconzada* v. *Churchill and Sim*. (3) But so far as my knowledge goes there is no clearer and more compendious statement of the law concerning this rather difficult rule of evidence than that which is to be found in the recent case of *Nippon Menkwa Kabushiki Kaisha* v. *Dawsons Bank, Ld.* (4) The judgment of the Privy Council in that case, delivered by Lord Russell of Killowen, contains this passage: "Estoppel is not a cause of action. It may . . . . assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or . . . . by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause

(1) 6 Ad. & Ell. 469, 474.
(2) 2 Ex. 654, 663.
(3) [1906] 1 K. B. 237.
(4) 51 Ll. L. R. 147.

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of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or some one on his behalf (*b*) with the intention that the plaintiff should act upon the faith of the statement and (*c*) the plaintiff does act upon the faith of the statement." There are thus three conditions necessary to bring the rule of estoppel into play. Applying this test to the present case it is difficult to see how any one of the conditions can be said to have been fulfilled. It is true that Square himself made the statement quite categorically that the Scotch marriage had not taken place, but he never made it to the respondent. Whatever his knowledge or belief may have been at any moment, he was certainly never in a position to inform, still less to mislead, the respondent upon the subject. Her knowledge of the facts must at all times have been greater than his. The fallacy lies in supposing that because he may have led her to believe that he would always act in a certain way he cannot now be allowed to act differently. A volte-face of this character may open a man to grave reproach, possibly even to some kind of action for breach of promise or contract, though I do not pretend to see how such an action could lie; but there is no attempted change of any statement of fact made by Square to the respondent. And if considered in the light of the second and third conditions laid down by Lord Russell of Killowen the matter becomes clearer still. Square did not make the statement which he made by his plea in the English proceedings or elsewhere with any intention that the respondent should act upon the faith of the statement. The respondent was at the same time making the same statement upon her own initiative for a common purpose. If two people with the same source of information assert the same truth, or agree to assert the same falsehood at the same time, I cannot see how either can be estopped as against the other from asserting differently at a later time. When, as in this case, the party claiming the benefit of the estoppel had in fact better information than the other party, the case would seem to be a fortiori.

Finally, what action did the respondent take upon the faith of any statement made by Square? Counsel did not and could not in fairness suggest that the respondent relied in the least upon what Square was saying in 1920 about the Scotch marriage. She was relying upon her own knowledge and her own statements about the happenings in Arran, in which she took part and Square did not, and though she might have acted differently if she had not thought that Square intended to stand by her, there was and could be no fact asserted by Square upon the faith of which she acted to her detriment. Although, therefore, it may be right to extend some measure of sympathy to the respondent and it may be difficult to admire the conduct of Square, there is no case here of an estoppel.

Counsel for the petitioner in the course of his argument was prepared to contend that there could never be an estoppel which could condition or decide matrimonial relations. In order to make good this proposition he would go to the full length of contending that some of the cases in the books have been wrongly decided. Parties, he averred, cannot be married by estoppel. Either they are married or they are not, and a mere rule of evidence cannot be allowed to interfere with a question of status, which concerns not merely the parties themselves but also the public interest. It may be that this question is as important and as difficult as he suggests. For the reasons I have given I do not think that it arises here.

Decree nisi of nullity on both petitions.

Solicitors: *Withers & Co.*, for Square. *Tippetts* for Mrs. Cowan. *Durrant Cooper & Hambling*, for Mrs. Square and Mr. Cowan.

R. M. M.

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Jan. 25;
May 8, 9, 10, 13, 15, 16.

THE AENEAS.

Shipping — Collision — Lights not in accordance with Suez Canal Regulations—Alleged "misleading" lights—Test applicable — Burden of proof.

The defendants' vessel *A.*, while tying-up to the bank in the Suez Canal to allow the plaintiffs' vessel *B.* to pass, was exhibiting three clusters of lights which, under the Canal regulations, should only be exhibited when the operation of tying-up is completed. The *A.*, however, was still exhibiting an arc lamp which should not be extinguished until the tying-up is completed, and she was also exhibiting her masthead lights and, until a moment before the collision, her starboard side-light. Her lights, therefore, were more consistent with her not being finally tied up than with that operation being completed so as to enable the *B.* to pass in safety.

In answer to the plaintiffs' allegation that they were misled by the lights, the defendants contended that if the *B.* had kept a better look-out she would not have been misled:—

Held, that the mere fact that if the *B.* had been keeping a better look-out, she might have appreciated the situation sooner, was not sufficient to exonerate the defendants; that the burden was on the defendants, who had broken, not indeed one of the International Regulations, but a rule of an accepted code laid down for Canal pilots, to prove not only that the breach ought not to have misled the *B.*, but that it did not in fact mislead her; and the Court, being of opinion that the *B.* was to some extent misled, found the *A.* one-fifth to blame, and the *B.*, which was coming too fast and took drastic helm and engine action causing her to sheer into the *A.*, four-fifths to blame.

Action of Damage by Collision.

The plaintiffs were the owners of the Norwegian motorship *Belita*; the defendants were the owners of the steamship *Aeneas*. The collision took place on the early morning of July 3, 1934, in the Suez Canal abreast of Kilometre Post 62. The *Belita*, a tank motorship of 6323 tons gross, was proceeding southwards; the *Aeneas*, a twin-screw steamship of 10,058 tons gross, was proceeding northwards bound to London with passengers and cargo, and it was her duty to tie up and allow the *Belita* to pass. Both vessels were in charge of Canal pilots.

By art. 23 (6.) of the Rules of Navigation for the Suez Canal, ships going through the Canal by night must be

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provided with a projector (search-light) and overhead lights to light up a circular area around the ship.

By art. 26 (3.): "When a ship . . . . is about to tie up . . . . she must at once extinguish her projector and turn on her overhead lights. When she has completed tying-up she must extinguish her overhead lights and her navigating lights and hoist the lights prescribed in the Special Book of Signals." The instructions as to these lights, according to the translation from the French "Signals, 1928 edition," are as follows: "At night: extinguish search-light and light arc lamp at the moment of commencing mooring manœuvres. Extinguish the lamp and put 2 or 3 white lights [hereinafter referred to as cluster lights] along the side of the vessel when the mooring is completely finished."

The *Aeneas* was exhibiting the regulation lights for a steamship under way and a search-light projector. A white cluster of lights was also being exhibited on either beam of the *Aeneas* so as to illuminate the banks of the Canal. [This cluster, while not provided for by any of the Canal regulations, was exhibited at the request of the pilot. There was, however, in his Lordship's judgment, no reason why the pilot should not have such lights if he wanted them.] When the *Aeneas* began to tie up, the search-light projector was switched off, the forward overhead arc light was switched on, and very shortly afterwards three clusters of lights were exhibited along her starboard side. In the meantime ropes had been sent ashore, but while the after rope was still being hove on so as to bring the stern of the *Aeneas* close in to the bank, the *Belita* sheered towards the *Aeneas* and with her starboard bow struck the *Aeneas'* starboard side.

The case for the *Belita* was that the exhibition of the three clusters of lights was an indication that the mooring of the *Aeneas* was completed, but that as the *Belita* approached the stern of the *Aeneas* swung out into the middle of the Canal. The case for the *Aeneas* was that the *Belita* was proceeding at excessive speed; sheered into the *Aeneas*; and attempted to pass her before it was safe to do so; and that those on the *Belita* ought to have seen that the *Aeneas* had

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not completed the operation of tying-up and had not got her stern quite parallel with the bank.

H. G. Willmer and *P. F. Y. Radcliffe* for the plaintiffs.
E. A. Digby K.C. and *Owen Bateson* for the defendants.

[The case is reported only on the effect, as regards the burden of proof, of the breach of a Canal regulation which the defendants alleged could not or ought not to have misled those on board the *Belita*; and the arguments sufficiently appear from the judgment. In addition to the cases there cited reference was made to art. 30 of the Regulations for Preventing Collisions at Sea; Marsden's Collisions at Sea, 9th ed., pp. 46, 47, and 461; Williams & Bruce's Admiralty Practice, 3rd ed., p. 99; and, by the Court, to *Derry* v. *Peek*. (1)]

May 16. THE PRESIDENT (SIR BOYD MERRIMAN) found the facts, so far as necessary to this report, as follows: The lights of both vessels were in full view of each other for at least three miles, and there was a bad look-out on the *Belita*, which was proceeding at an excessive speed; and when those on board realized that the *Aeneas* was not in fact completely tied up and still had a slight angle across the Canal they hard-a-ported their wheel and put their engines full speed astern, with the result that the *Belita* sheered into the *Aeneas*. The allegations (*a*) that the *Aeneas*' stern suddenly swung out across the Canal and (*b*) that not until the last moment was the light signal exhibited indicating that she was not yet properly tied up, were not well founded. As regards the *Aeneas*' lights, "coming up the Canal she had been exhibiting her navigation lights and her projector search-light, and the projector light was only extinguished at a time before the collision which at least made it doubtful whether there was sufficient time for her to tie up before the *Belita* passed. When the projector light was switched off the arc light was switched on and that light was not extinguished until after

(1) (1889) 14 App. Cas. 337, 357.

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the collision. But as she came to tie up, and at a time when she was by no means a vessel which had completed the operation of tying-up, the cluster of lights, which are prescribed by the Canal Code of Signals as being the lights to be exhibited concurrently with the extinction of the arc lamp when the mooring is completely finished, were put up. The masthead lights were not extinguished until after the collision, and the starboard side-light was taken in a matter of seconds before the collision. All the lights, therefore, with the exception of the cluster lights, were more consistent with the vessel not being tied up than with her being tied up."

[His Lordship continued as follows:] I have now to decide what is the legal result of that improper exhibition of lights. In my view the law is this: Although the code as to lights in the Canal is not part of the international code of rules for navigation at sea, it is, nevertheless, so clearly the accepted code laid down for the compulsory pilots that no one really suggests that I should not accept it as the proper rule of conduct. It is not disputed that there has been a definite breach of the rules in the code, and I cannot see how there can be any essential difference in the principles to be applied to these rules and to a breach of any of the international rules. I think the principle to be applied, when there is a breach of a rule which is definitely asserted to have contributed to a collision, is that it is for those who have been guilty of the breach of the rule to exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision, actively, or to the resulting damage. Such, I think, is the result of cases like *The Fenham* (1), decided before the Maritime Conventions Act, and also is the real effect of the judgment of the House of Lords in *The Karamea* (2), a decision after the Maritime Conventions Act had modified the old rule as to the statutory presumption of fault. That being so, it is obvious that with every yard, speaking figuratively, that the *Belita* approached the *Aeneas* without taking palliative or immediate measures to diminish the effect of her excessive speed, the danger is

(1) (1870) L. R. 3 P. C. 212. (2) [1922] 1 A. C. 68, 77, 78.

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increased. Unless, therefore, I can say not only that she ought not to have been coming so quickly, but that she cannot possibly say that she was misled into delaying her action or in judging what action would be appropriate, I do not think that it is possible to say affirmatively that the *Aeneas* has exonerated herself.

I think that the test is not whether the *Belita* ought to have been misled, but whether she was, in fact, misled. I think that the analogy which Mr. Willmer used to cases of deceit is apt; that what the plaintiff has to prove is that he was deceived, although a reasonable man might not have been deceived. The relevance of the consideration whether a reasonable man would have been deceived is the assistance which it affords to the Court in arriving at a conclusion whether it believes or disbelieves the plaintiff who says that he was deceived; because if one gets a state of facts which would not deceive a child, one does not, or may not, believe a grown man who says that he was deceived by the particular circumstances. Similarly here, I do not think that the question whether those on the *Belita* ought to have been deceived is the decisive test. If that is all, it leads nowhere except to the question of the attribution of blame on the one side or the other. The real importance of the question whether they ought to have been deceived consists in the bearing it has on the question whether they were, in fact, deceived.

Giving the best consideration I can to this matter, and bearing in mind where the onus lies, I find it impossible to hold that the sudden appearance into view of this set of cluster lights at a time when the ships were about ten lengths apart could have had no effect in misleading those on board the *Belita* in the action which they took. I find that in fact they did delay action which ought to have been taken, and they drifted into a position in which, in their mistaken idea of the facts, they thought it necessary to take the most dangerous action which could have been taken in the circumstances.

But I am satisfied that to some extent, notwithstanding

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the indications which they had to the contrary, they were misled at about ten lengths distance, and thereafter as they approached her, into thinking that the *Aeneas* was a ship which to all intents and purposes was tied up, and then when quite close they suddenly realized that she was angled out into the Canal. They exaggerated the angle, they need not have taken the action they did, the one action which in effect drove them into the *Aeneas*. But I cannot acquit the *Aeneas* of her share, however small it may be, of the blame for that. I think that a very careful look-out on the *Belita* was certainly demanded, having regard to the speed at which she was approaching. I think that a more careful look-out on the *Belita* would probably have enabled them to appreciate the situation better and to act accordingly, but I think that the performance of their duty of minimizing the consequences of the negligence implied in the speed at which they approached the *Aeneas* was made more difficult by the exhibition of the wrong lights.

In these circumstances I find both vessels to blame in the proportions of four-fifths to the *Belita* and one-fifth to the *Aeneas*, and there will be no order as to costs.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*

Solicitors for the defendants: *Stokes & Stokes, for Alsop, Stevens & Collins Robinson, Liverpool.*

E. C. M. T

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May 2, 3, 7; June 7.

Shipping—Damage to Cargo—Bill of lading—"Shipped in good order and condition"—"Condition . . . . unknown"—Contract—Estoppel—Short delivery—Bill of lading "conclusive evidence" of quantity delivered to ship.

A quantity of timber was shipped on board the defendants' ship under bills of lading which described it as shipped in "good order and condition" to be delivered "in like good order and condition." The timber was, to the knowledge of the defendants' master, in a bad condition, and he added the word "condition" to a clause on the back of the bills of lading, "quality, description and measurement unknown," so that the clause read "condition, quality (etc.), unknown."

The plaintiffs bought the timber from the shippers on formal contracts and received the bills of lading before the timber arrived. In an action against the shipowners the plaintiffs based their claim on breach of contract and estoppel:—

Held, (*a*) following the dictum of Channell J. in *Compania Naviera Vasconzada* v. *Churchill & Sim* [1906] 1 K. B. 237, 247, that "shipped in good order and condition" are not words of contract, and that the words "to be delivered in like good order and condition" cannot stand alone to make a contract to deliver in good order and condition; and that accordingly the claim in contract failed; (*b*) that "condition . . . . unknown" was not such a qualification of the statement "shipped in good order and condition" as to convey to the plaintiffs that the timber was in a damaged state, and that, had the plaintiffs acted on the statement to their detriment, the defendants would have been estopped from denying that the timber was shipped in good condition; but, as there was a clause in the contracts of sale that the buyers should not reject the goods but refer any dispute to arbitration, the claim based on estoppel also failed.

Two other parcels of 1398 and 494 pieces of timber were short delivered. The bills of lading were expressed to be subject to the terms of the charterparty, which provided that the bills of lading should afford conclusive evidence of the number of pieces delivered to the ship. Both parcels had been lost from a scow alongside the ship during a storm before shipment. The bill of lading in respect of the 1398 pieces made this clear, but as regards the 494 pieces the bill of lading was claused "494 pieces of these lots not on board, being included in specification No. 5 lost from the ship."

Held, that as regards the 494 pieces the bill of lading was not so claused as to bring it to the notice of the plaintiffs that these pieces were not delivered to the ship; that the defendants were bound by the "conclusive evidence" clause; and that to this extent the plaintiffs' claim succeeded.

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DAMAGE AND SHORT DELIVERY OF CARGO.

The plaintiffs were the owners of cargo lately laden on board the steamship *Skarp ;* the defendants were the owners of the *Skarp.* The action arose in respect of 74,781 pieces of timber of which the plaintiffs alleged that the defendants acknowledged the shipment in good order and condition for carriage to Manchester and delivered 72,889 pieces in a damaged condition, and failed to deliver 1892 pieces at all.

The facts are sufficiently summarized in the headnote and are fully set out in the judgment.

Sir Robert Aske K.C. and *H. Atkins* for the plaintiffs. As regards the delivered timber, the defendants undertook to deliver it in good order and condition : see *Compania Naviera Vasconzada* v. *Churchill & Sim* (1), and their contractual obligations are not altered by the words " condition . . . . unknown " : see *The Tromp.* (2) In order to succeed the defendants must strike out the word " good."

If the plaintiffs cannot base their claim in contract they rely on estoppel. The defendants' master represented that merchantable spruce deals in good order and condition were shipped, and the defendants cannot be heard to say that the condition was " unknown," when by their master they knew that the timber was wet, musty and in bad condition : see *The Tromp* (2) and *New Chinese Antimony Co.* v. *Ocean Steamship Co.* (3) Further, they have not negatived " good order " ; " order " is wider than " condition." Lord Merrivale in *The Tromp* (2) said : " The words ' quality, condition unknown ' do not cover the whole area of the representation made by the words ' shipped in good order and condition.' "

[LANGTON J. referred to *Nippon Menkwa Kabushiki* v. *Dawson's Bank.* (4)]

As regards the 494 pieces short delivered, to any person taking up the bill of lading the meaning of the words " not on board . . . . lost from the ship " is that the timber had

(1) [1906] 1 K. B. 237.
(2) [1921] P. 337, 348.
(3) [1917] 2 K. B. 664.
(4) (1935) 51 Ll. L. R. 147, 150.

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been delivered to the ship, and if so, according to clause 18 of the charterparty, the bill of lading is " conclusive evidence " against the defendants as to the quantity stated to be delivered to the ship. The phraseology as regards the 1398 pieces is also ambiguous: " Not on board of ship, being lost from scow No. 5 during storm alongside "—the bill of lading does not say " not delivered " or " not shipped." There is no clear statement, as in *Lohden & Co.* v. *Charles Calder & Co.* (1) The plaintiffs paid for the whole of the timber including the pieces short delivered, and on the " conclusive evidence " clause are entitled to recover: see *Fisher, Renwick & Co.* v. *Calder & Co.* (2) The Courts do not encourage shipowners to sign clean bills of lading for goods not on board: *Crossfield & Co.* v. *Kyle Shipping Co.* (3)

David Davies K.C. and *Cyril Miller* for the defendants. The plaintiffs must rest their case on estoppel and not on contract. " Shipped in good order and condition " are not words of contract (per Channell J. in *Compania Naviera Vasconzada* v. *Churchill & Sim* (4)), and the words " to be delivered in like good order and condition " cannot stand alone to make a contract to deliver in good order and condition. The point was not taken before Channell J. by Mr. Hamilton (Lord Sumner), and there is no substance in it. " Condition " and " order," as regards timber shipments, mean the same thing: see Lord Merrivale's observations in *The Tromp* (5) and Abbott's Merchant Shipping, 5th ed., 214, and " condition . . . . unknown " is a time-honoured formula which merely means that the master makes no admissions as to condition, and it gets rid of the prior statement that the goods were shipped in good condition, just as " weight unknown " is the appropriate phrase by which the shipowner does not bind himself to the stated weight of goods shipped: see *New Chinese Antimony Co.* v. *Ocean Steamship Co.* (6)

[LANGTON J. There was no contradiction in that case;

(1) (1898) 14 Times L. R. 311.
(2) (1896) 1 Com. Cas. 456.
(3) [1916] 2 K. B. 885, 893.
(4) [1906] 1 K. B. 237.
(5) [1921] P. 337.
(6) [1917] 2 K. B. 664.

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how can the external condition of timber be "unknown" when the master has seen it and logged it as being in bad condition ?]

Reading the document as a whole, there is no clear statement that the condition of the timber was good. At least there is sufficient qualification to raise a doubt in the mind of a reasonable man taking up the bill of lading, and that is enough ; if there is a qualification, it is not a clean bill of lading : *Restitution S/S Co.* v. *Sir John Pirie & Co.* (1) No representations were made, but, even if it be held that there were representations, the plaintiffs did not act on the faith of them to their detriment.

[*Sir Robert Aske K.C.* That is presumed : *Silver* v. *Ocean Steamship Co.* (2)]

Under the contracts of sale they were bound to accept the goods and pay for them and refer any dispute to arbitration. They have not therefore altered their position to their detriment and there is no estoppel : see *Simm* v. *Anglo-American Telegraph Co.* (3) and *Montague L. Myer, Ld.* v. *Kivisto.* (4)

As regards the timber short delivered, clause 18, relied on by the plaintiffs, says that the bills of lading shall be conclusive evidence of the quantity "delivered to the steamer." "Delivered" means shipped on board : *Bowes* v. *Shand* (5) ; and the defendants made it clear that neither parcel in fact was ever on board. If necessary, the defendants rely on the exception of "perils of the sea."

Sir Robert Aske K.C. in reply. The words of contract are "to be delivered in like good order." In *Compania Naviera Vasconzada* v. *Churchill & Sim* (6) Channell J. said that the contract was to deliver goods in the same condition as when they are shipped ; the Court did not have to consider whether there was any distinction between "order" and "condition." As regards estoppel, the plaintiffs relied on the representations ; they would have been justified in rejecting the timber if its true

(1) (1889) 61 L. T. 330.
(2) [1930] 1 K. B. 416.
(3) (1879) 5 Q. B. D. 188, 208, 211.
(4) (1929) 35 Ll. L. R. 265.
(5) (1877) 2 App. Cas. 455, 484.
(6) [1906] 1 K. B. 237, 246.

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state had been disclosed: see *Vigers Bros.* v. *Sanderson Bros.* (1) and *Evans* v. *James Webster Bros., Ld.* (2) Further, the evidence is that they would have rejected the timber, and the onus is on the defendants to satisfy the Court to the contrary. The contracts of sale are res inter alios acta, and the defendants cannot avail themselves of the provisions in them. Further, the contract is that the buyer shall not reject the goods, it does not provide that he shall not reject the documents: cf. *Jordeson & Co.* v. *London Hardwood Co.* (3), and the plaintiffs had not seen the timber when they accepted the documents. If the timber had been truthfully described, the presumption is that no "dispute" would have arisen between the parties to the contract of sale.

[Reference was also made to *The Ida* (4) and *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha.* (5)]

Cur. adv. vult.

June 7. LANGTON J. This case has given me no little amount of trouble, and I should like to have had an opportunity of putting my judgment into writing, but I have unfortunately been prevented from doing so.

The case arises out of a shipment of certain parcels of spruce deals and ends. These timber goods were shipped in the *Skarp* at Parrsboro, Nova Scotia, by George McKean & Co. for delivery at Manchester. So far as I am concerned with them the parcels were sold, and I will detail later the process of sale. The damage complained of was, as regards certain parcels, that they were delivered wet and mouldy, and, as regards two other parcels, that they were short delivered.

The main part of the case centres round the damaged goods. To deal first with the business of the matter, this was put before me by the cashier in the firm of one of the receivers or assignees of the bills of lading. His evidence was that the method of conducting the business

(1) [1901] 1 K. B. 608.
(2) (1928) 34 Com. Cas. 172, 177.
(3) (1913) 19 Com. Cas. 161, 164.
(4) (1875) 32 L. T. 541.
(5) (1919) 1 Ll. L. R. 51.

(and I understand it was accepted on both sides that the business in all cases in this litigation was the same) was this : the receivers bought on a sale note ; there was then a formal contract, and much turns upon the formal contract. Then the documents—that is to say the policy of insurance, and the bills of lading, were seen by the buyers. The sale was on the usual c.i.f. terms and the buyers, of course, were entitled to the policy of insurance and bill of lading. There were some ten bills of lading ; nine of them were in one form and one of them was in another form. Owing to the conclusion to which I have been reluctantly forced it makes no difference which form of bill of lading one adopts. But the point of difference was that in nine bills of lading the document was qualified by the insertion of the word " condition " in type before the printed words " quality, description and measurement unknown, steamer not responsible for splits and shakes."

The plaintiffs' case was put in two or three ways, but the principal controversy as regards these damaged goods centres upon the question whether the shipowners were estopped by the statement in the bills of lading that the goods were " shipped in good order and condition " from asserting that they were shipped in a different condition—namely, a damaged and wet condition. For the purposes of that argument it is a matter of prime importance whether this qualification produced by the word " condition " appeared in the bills of lading or not. I mention this in passing to show that I have considered all the cases that were put before me, and have not omitted the single instance where the word " condition " did not appear in the bill of lading.

I will now consider the business from the other end. The shipowner carried these goods under the common form of charterparty of the Chamber of Shipping British North American (Atlantic) Wood Charterparty, 1914. Under clause 18 of the charter, " bills of lading in the form endorsed on this charterparty, shall be signed by the master :—freight and all conditions, terms and exceptions as per this charterparty " ; and then, curiously enough, the clause goes on to

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detail certain clauses that are to be in the bills of lading. It was a feature not much stressed in argument, but in this charterparty there are two clauses incorporated on the back of the bills of lading in the form prescribed, and it is interesting to note that the first of them is " quality, description, and measurement unknown. Steamer not responsible for splits and shakes." That actually appears in clause 18 of the charterparty and it is a matter which, in another case, may be interesting as a subject for argument, whether with a charterparty of this kind in which all conditions are to be, " as per charterparty " the shipowner can have any right at all to alter the form set out in that charterparty, and introduce into the bill of lading terms for which there is no provision in the charterparty itself. However, that is not the line upon which the case was argued here.

To continue the history from the shipowners' point of view, when the master arrived at Parrsboro he found the cargo in anything but a good condition, and in fact he entered in his log " the cargo lay in lighters, so a tallyman had to be kept at each hatch to tally each sling. Moreover, the cargo was in a very bad state ; very black, wet and partly musty." In that difficult state of affairs the master appears to have sought counsel from a gentleman who was connected with his insurance company, and between them they seem to have determined that they would deal sufficiently with the rights of parties who might ship, or receive, the goods, and at the same time protect the owners of the ship, by inserting the word " condition " in the place I have indicated—namely, in front of the qualification " quality, description and measurement unknown."

The goods arrived at Manchester preceded by the bills of lading, which, so far as the condition was concerned, had no other qualification upon them than the insertion of this typed word " condition." They were, in all cases, taken up by the buyers, and, now that the condition of the goods is known, the buyers claim against the shipowners and say " you, the shipowners are estopped from saying that these goods were otherwise than in a good order and condition

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because you so asserted on bills of lading, and have led us to act to our detriment." That shortly is the contention upon which the first dispute is founded.

Sir Robert Aske for the plaintiffs, oppressed by the difficulty which I shall have later to notice, put his case at first upon a different ground to that which I have indicated, and I do not wish to suggest that he ever retracted from his first point; on the contrary he emphasized it very much in his reply. He said: "I do not need any estoppel here and I do not need to rely upon the doctrine of estoppel: further I agree that the words 'shipped in good order and condition' are not words of contract." Indeed that matter was made abundantly clear by Channell J. in *Compania Naviera Vasconzada* v. *Churchill & Sim.* (1) In a judgment which, so far as I know, has never been criticized, and was never taken to the Court of Appeal, Channell J. said: "The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods." Sir Robert's contention, however, was that the words "to be delivered in like good order and condition" are words of contract, and that if the goods are not delivered in good order and condition there is a breach of contract. It is nothing against this point that it is an entirely novel one. I do not even know that it is a serious criticism of the point that, although it has been open for many years to be taken in cases of this class, it apparently never has been taken until this case. But for my part I cannot accept it. "To be delivered in the like good order and condition," if one is to base anything upon it at all, must refer to some antecedent state—one cannot cut out the words "the like," and give any sense to these words of contract. Unless one refers to some ascertainable antecedent state, there is no standard of comparison, and I am at a loss to understand how a shipowner can be said to be under a contractual obligation to deliver goods "in the like good

(1) [1906] 1 K. B. 237, 247.

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order and condition" when regard cannot be had to any antecedent state to discover what was the order and condition to which "the like" is comparable. It is for that reason, therefore, upon its merits, and not because of any quality of novelty, that I have been driven to believe that this point is a false one.

The controversy then centred upon this main question of estoppel. The text-books do not show any case in which a shipowner has attempted to clause his bill of lading by the introduction of the word "condition" in these circumstances. For, be it observed, one is dealing here with timber goods, and there is no question that there are many classes of goods as to which there may be a distinction when one is speaking of their apparent condition and of their real condition. Potatoes in sacks may be in apparent good order and condition because the outside of the sacks is dry and in good condition, although in fact the condition of the potatoes inside the sacks may be deplorable. But we are here dealing with goods as to which the condition must refer to real condition, and the bills of lading, as they stand, make two completely contradictory statements: (1.) "shipped in good order and condition" and (2.) "condition unknown." Mr. Davies, on behalf of the defendants, in an adroit argument said that this is the way in which a shipowner ought to deal with a matter of this kind. If he wants to say that he has not measured the goods he says "measurement unknown"; if he wants to say that he has not weighed them he says "weight unknown"; and, if he wants to say that he makes no representation as to condition, he puts in "condition unknown." It is the method sanctified by usage and time. I have considerable doubts as to the soundness of that contention. Still more have I doubts when in the charterparty itself the clauses to be incorporated in the bills of lading are in terms laid down. Furthermore I think that it is profitable in this case to take account of how and why the master came to insert this word in the bills of lading.

The master was confronted with the fact that the goods were certainly damaged. The straightforward thing to do

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was surely to put upon the bills of lading, in the ample margin which is apparently provided for that purpose, a clause which would clearly advertise to any buyer of a particular bill of lading that the goods he was going to receive were not in good order and condition. It would not have been beyond the master's power to take the entry from his own log, and to put upon the bills of lading " very black, wet and partly musty." If he could see it for the purposes of his log, he could with the same eye have seen it for the purposes of the bills of lading. But in truth and in fact he was much worried about his own employers' interests, and it was for that reason that he took this circuitous route of putting the word " condition " in what is, to my mind, a most obscure place. That is the genesis of the matter.

One must look at it as a matter of construction. What would those words in a bill of lading convey to anybody who read them ? What, in the first place, would " shipped in good order and condition " followed by " condition unknown " convey ? Speaking for myself, they would have conveyed nothing at all to me. The only witness who was called (although I think he was an entirely honest man, I cannot place much dependence upon him, because he was the cashier and did not appear to have had any long experience of the business side of this class of transaction) said that he had regarded the bill of lading as " clean." To my mind, having regard to the well known method which is always at the disposal of the masters of steamships to describe damaged goods, this is a wholly unsuitable method—a most ambiguous method—and does not convey at all that the goods are damaged or even may be damaged. If I had to speculate as to what was the most probable effect on the mind of anybody who read the bill of lading so phrased, I should say that the person reading it would think that this master had got some idea that he was responsible for the condition of the wood, whether it was ripe or over-ripe or something of that sort ; but I cannot imagine that it would bring to the mind of the reader the fact that a man who had been at no pains to clause the bill of lading

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in the natural way meant to convey that the goods were or might be damaged. Another and perhaps clearer way of putting it is that it is difficult to understand why the affirmation or acceptance of one untruth should be cured by a deliberate statement of another untruth. It is true that the words "shipped in good order and condition," as Channell J. pointed out, are not words of contract, but they are an affirmation or assent to an affirmation of fact, and in this case they were an affirmation of an untruth. They were words which to the plain knowledge of the master were totally untrue: the goods were not shipped in good order and condition, and well he knew it. It is argued that he escapes from any difficulties occasioned by this assent or affirmation of an untruth by making of his own free will another statement which he knows quite well to be untrue—namely, that "the condition was unknown." The condition was not unknown. The condition was stated clearly, forcibly, and lucidly in his log, and, it would be deplorable that a person should be allowed to escape from the penalties, if any, attached to the first assent to one untruth by a deliberate statement of another.

Primarily, however, this is a matter of construction, and I hold that the insertion of the word "condition" in the way it was inserted here, is not such a qualification of the original statement "shipped in good order and condition" as to bring to the mind of anybody reading that document that the goods were, or even might be apparently, and to the knowledge of any one who had seen them, damaged goods.

Sir Robert Aske further argued that there was another ground upon which he could claim estoppel. He said that, even assuming that Mr. Davies's argument would hold good as to the word "condition," there was still the word "order" in the bills of lading, and upon Lord Merrivale's judgment in *The Trompf* (1)—and indeed upon general principles—he could argue that the insertion of the word "condition" did not cover the whole of the area of a representation made by the words "shipped in good order and condition." It is only fair,

(1) [1921] P. 337.

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in case this case goes higher, to say that Sir Robert was equally tenacious of this point as of the other points and that it was by no means a subsidiary point. I am afraid that it does not appeal to me. Mr. Davies was quick to rejoin that in the old forms of bills of lading it was not unusual to find the word "condition" in one part of the document and "order and condition" in another. There is, too, the unfortunate feature that in this very judgment in *The Tromp* (1) Lord Merrivale goes out of his way—true it is only obiter—to fasten upon the case of timber goods as an illustration of where the words "good order" and "good condition," may perhaps have the same meaning. There is another point which Mr. Davies was too chivalrous to press; the able and careful pleader had clearly not envisaged this subtle argument of his leader, because he also had fallen into the somewhat common fallacy, if Sir Robert is right, of regarding the two words as covering a similar area. I deprecate excursions into dictionaries or into philological matters which are beyond my ken, but I can see no ground on which one can stand to differentiate in this case between the words "order" and "condition." I am, therefore, against the plaintiffs upon that contention, though I go whole-heartedly with them when they say, as a matter of construction, that the bills of lading should be construed in the way for which they contend.

Now I come to the second part of this question of estoppel. I called attention during the argument to Lord Russell's recent pronouncement in the Privy Council upon this subject, and because it is, so far as my knowledge goes, the most lucid statement of the matter in a small compass, I will quote it again here. The case is, for the moment, only reported, so far as I know, in Lloyd's List Law Reports. (2) Lord Russell says this: "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would

(1) [1921] P, 337. (2) 51 Ll. L. R. 147, 150.

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destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement." I have no difficulty here with regard to the first of the three conditions there laid down. I am satisfied that "a statement of the existence of a fact," namely that the goods were shipped in good order and condition, has been made by the defendants, or an authorized agent of theirs, to the plaintiffs or to some one on their behalf. I have equally no difficulty with regard to the second, that it was made "with the intention that the plaintiff should act upon the faith of the statement." But the crux comes over this third condition, Did the plaintiffs act upon the faith of the statement? As to that, a consideration of the dicta of the Court of Appeal in *Silver* v. *Ocean Steamship Co.* (1) is important. In that case all three judges of the Court of Appeal went further, I think, than any one had gone up to that date in assisting plaintiffs placed in the difficult circumstances in which merchants are placed by these misstatements in bills of lading. Scrutton L.J. said this: "The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and condition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it." Greer L.J. stated much the same doctrine though with a little doubt. He said this: "I think, however, though with some doubt, that the Court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped, and that in accepting the bill of lading and taking

(1) [1930] 1 K. B. 416, 428, 434, 441.

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delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any reasonable examination. On the other hand I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination." Slesser L.J. said: "The appellant took the bill and may be assumed to have relied upon it to his detriment in the absence of any evidence to the contrary."

These observations certainly assist the plaintiffs in this case. The evidence was meagre and, indeed, so far as this matter was concerned, confined to the evidence of the cashier of one of the shippers, who went so far as to say for his part that, had the bill of lading notified to him that the goods were shipped in bad condition, his principals would have claimed total rejection. I have no reason to suppose that that is not a perfectly bona fide statement on the part of the cashier. But at this point Mr. Davies brought into play the contract upon which these goods had been bought, and I cannot see that he is not entitled to take the contract and analyse it for the purpose of his case. Sir Robert said, amongst other things, that this contract is res inter alios acta. That is a perfectly fair comment, but, on the other hand, it is the res out of which the complaint here springs. The plaintiffs say: "We acted to our detriment in the matter of this contract owing to your misstatement." The whole of their estoppel must be based upon this contract, and I cannot see that it is wrong to examine the features of this contract, or indeed that one could act otherwise, to test whether the plaintiffs are right in saying that they acted to their detriment. The doctrine laid down by the Court of Appeal in *Silver* v. *Ocean Steamship Co.* (1) gets the plaintiffs so far that they are entitled to say that in the absence of evidence to the contrary the Court must assume that the plaintiffs did act to their detriment in taking up the bills of lading. It cannot take them far enough to be able to say that no evidence to the contrary can be considered.

(1) [1930] 1 K. B. 416.

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The contract says in the clearest possible terms: "should any dispute arise respecting the fulfilment of this contract or should the shipment be delayed beyond the time stipulated, the buyers"—I am leaving out the immaterial words—"shall not reject the goods, nor refuse immediate payment for same in manner stipulated. When due payment has been made, the dispute shall be referred to two arbitrators for settlement, one to be named by each party, with power to name a mercantile umpire. The decision of such arbitrators or of their umpire to be conclusive and binding upon all disputing parties, the expense of such arbitration to be equally divided, and the decision may and shall be made a rule of His Majesty's High Court of Justice, on the application of either party." Sir Robert Aske cited several cases which he says go to show that the Courts would never allow such a clause to be weighed against the plaintiffs in these circumstances. He cited, amongst others, *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha* (1); the well known decision of Bigham J., as he then was, in *Vigers Bros.* v. *Sanderson Bros.* (2); and the dictum of Wright J. in *Evans* v. *James Webster Bros., Ld.* (3). I have looked through those cases with care and with sympathy with Sir Robert's contention, but I cannot see that any of them have any real bearing upon this point. The circumstances of those cases are widely different, and the only points of general doctrine to be collected were, first the well known doctrine that where goods were not of merchantable quality a buyer would be entitled to reject, and, secondly, that Courts would not be astute to suppose that any merchant would be eager to break his contract. Sir Robert was bound to argue that he might have been in a better position if he had broken his contract. I cannot think that that is a tenable argument. It is difficult to see how courts of law are to prosecute their business if they are to speculate upon what the rights and duties of persons are, not upon the theory that they keep their contracts, but on the theory that they

(1) 1 Ll. L. R. 51. (2) [1901] 1 K. B. 608.
(3) 34 Com. Cas. 177.

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break them. That is introducing, to my mind, a novel and most unwelcome class of speculation.

I think I must assume that the plaintiffs would have kept their contracts, and if so, in view of these wide words " should any dispute arise respecting the fulfilment of this contract," and in view of the undisputed fact that these goods were goods within the contract description, I fail to see how they could have acted otherwise than as they did, even if the bills of lading had been what I prefer to call honestly claused rather than ambiguously claused. If they had been honestly and clearly claused as appertaining to damaged goods, so long as they did not suggest that the goods were unmerchantable or of different quality, and of different sizes to the contract goods, so far as I can see the plaintiffs would have been obliged to do what they have done—namely, take up the documents, pay for the goods, and then seek an allowance by way of arbitration.

I am sorry to have had to come to this conclusion, but since the days when Channell J. gave his decision in *Compania Naviera Vasconzada* v. *Churchill & Sim* (1) it is common knowledge that there has been a great advance in this matter of commercial arbitration. It is not for me to say whether that is wise or unwise, but I cannot shut my eyes to it, and merchants cannot have it both ways. If they prefer to submit their disputes to commercial arbitration and to put clauses of this character into their contracts, I do not think that they can be heard to say that their position has been in any way altered by the fact that the bill of lading fails to give them information which would not have enabled them, in the circumstances, to act in a different way.

That, I think, disposes of what is really the main dispute, the question of these damaged goods. Because they cannot fulfil the third condition, showing that they have acted to their detriment, the plaintiffs cannot I think rely upon this question of estoppel. If they have not got estoppel and they have not got the ground of contract, there is nothing left of their case upon the question of damage.

(1) [1906] 1 K. B. 237.

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The second point—the question of shortage—can I think be dealt with much more quickly. Here again there is really a question of construction. The point arises as regards two bills of lading only, one of them as regards a comparatively large parcel of 1398 pieces. The bill of lading in that case stated the full number as being on board, but as to these 1398 pieces it was claused in this way "Being our order 11 and not on board of ship being lost from scow 5 during storm alongside": the description of the pieces was quite clear upon that bill of lading, 1320 deals and 78 ends, making 1398. The second parcel as to which there was a shortage was as regards 494 pieces, and there the clause is "494 pieces of these lots not on board, being included in specification as being a part of scow 5 lost from the ship." The question of construction as to what would be conveyed to persons reading these documents seems to me to be largely a question of first impression. Indeed I am not sure that first impression is not really the safest guide—the natural and ordinary reading when the document is presented to a merchant in the course of business. Applying this test, the two cases seem to me to fall upon different sides of the line. As regards the 1398 pieces I, personally, would, I think, have been perfectly clear as to what was intended—namely, that they never were on board the ship, and were lost from the scow during a storm alongside. As regards the second, the 494 pieces, I am quite certain that my first feeling upon reading that clause would have been one of complete bewilderment, and I cannot imagine that that bewilderment would have been resolved if I had read further or studied more, and, therefore, I do not think, as regards the 494 pieces, that the bill of lading has been so claused as to bring to the mind of the person reading it that the 494 pieces were not shipped on board at some time. The importance of this ruling is that the charterparty contains a conclusive evidence clause, and there is, therefore, no doubt at all that the shipowner is bound by the quantity in the bills of lading, unless the bills make it perfectly clear that some portion of what is there stated as shipped on board was not delivered to the ship at

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all, and the undisputed effect of that conclusive evidence clause was to put the burden on the shipowner when once the number of pieces shipped has been stated in the bill of lading. There is no burden until then, but he is bound by the number he stated unless he gets rid of the burden by showing quite clearly on his bill of lading that certain of those parcels were not shipped.

My decision, therefore, on this matter of shortage is that the plaintiffs succeed as to the 494 pieces but fail as to the shortage of 1398 pieces.

After argument the plaintiffs were ordered to pay half the defendants' costs.

Solicitors for the plaintiffs: *Waltons & Co.*

Solicitors for the defendants: *William A. Crump & Son.*

E. C. M. T.

LOWTHORPE-LUTWIDGE AND ANOTHER *v.* LOWTHORPE-LUTWIDGE AND OTHERS.

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March 6, 7; *April* 17.

Will—Exercise of power of appointment—General revocatory clause in subsequent testamentary papers—Rebuttal of presumption of revocation of exercise of power—Evidence.

Although a general revocatory clause in a will does not necessarily revoke an earlier testamentary exercise of a power of appointment it requires cogent evidence to show that that effect is entirely unreasonable; otherwise a revocation of the appointment will result. Apart from cases in which strong evidence is forthcoming rebutting revocation, any doubt which may have previously existed of this effect of a general revocatory clause upon the previous exercise of a power by an earlier paper must be regarded as now set at rest by the decision in *In re Kingdon. Wilkins* v. *Pryer* (1886) 32 Ch. D. 604.

Smith v. *Thompson* (1931) 47 Times L. R. 603 distinguished on the facts.

PROBATE ACTION.

The plaintiffs, Hubert Fletcher Skeffington Lowthorpe-Lutwidge and Lucy Marjorie Spooner (married woman),

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two children of the testator, Ernest Frederick Lowthorpe-Lutwidge, who died on September 20, 1929, and interested under his will and a codicil thereto respectively dated June 18, 1917, and June 17, 1920, claimed that the said will and codicil should be admitted to probate along with a later will dated April 27, 1925, omitting from the later will a general clause of revocation. The defendant, Ernest Cecil Fletcher Lowthorpe-Lutwidge, the eldest son of the testator and tenant for life of settled land vested in the testator at his death, pleaded that the earlier will and the codicil were revoked by the later will, which he claimed should be admitted to probate alone.

The will of April 27, 1925, was in the following terms: "I revoke all former wills this being my last will and testament. I give and bequeath everything I die possessed of to Major Hugh Owen Swanston. Should the said Major Hugh Owen Swanston predecease me, I give everything I die possessed of to my daughter Mrs. Marjorie Spooner." No executor having been appointed by it, administration with the later will alone annexed had been granted on November 12, 1929, to H. O. Swanston as residuary legatee save and except settled land, and by a separate grant dated March 19, 1930, administration limited to settled land vested in the testator at the date of his death was granted to H. O. Swanston and certain other parties, trustees of the settled land, as executors as to settled land. H. O. Swanston died in 1933, and two other defendants, Sidney Charles Mennear and Percy Idle, were his executors. These defendants submitted to the judgment of the Court.

The will of 1925 was a holograph document prepared by the testator himself with the assistance of two friends, also laymen. The earlier will and codicil purported to be in exercise of certain powers of appointment vested in the testator. Since their execution the testator had been a party to a family arrangement of his property inconsistent with them, and his sole estate remaining at the date of the will of 1925 unaffected either by the earlier papers or the family

arrangement consisted of a small amount of personal belongings of about 40*l.* in value.

Clifford Mortimer for the plaintiffs. There was no animus revocandi with reference to the earlier papers. *Smith* v. *Thompson* (1) was a similar case. There also it was sought to revoke the previous exercise of a power over far the larger part of the estate by a general clause of revocation in a will which had dealt with a merely nominal amount of property without reference to the power. It is a question of intention, and the Court should pronounce for a paper earlier in date than a will with a revocatory clause, provided that the Court is satisfied that the deceased had no intention to revoke the earlier paper: *Gladstone* v. *Tempest.* (2) The words of revocation were the work of lay will-makers, and suggest what appeared to them a common form rather than any deliberate intention of the testator: *In the Goods of Oswald.* (3)

[He also referred to *In the Goods of Sarah Moore.* (4)]

Roxburgh K.C. and *H. W. Barnard* for the defendant, E. C. F. Lowthorpe-Lutwidge. The presumption that a capable testator, who has read or had read to him a will that he subsequently executes, has knowledge and approval of its contents, requires very clear evidence to exclude from probate any part of the will: *Gregson* v. *Taylor.* (5) The same rule had already been expressly extended to words of revocation in the face of evidence of want of intention much stronger than the inference in this case: *Collins & Tuffley* v. *Elstone.* (6) And since the decision of Kay J. in *In re Kingdon. Wilkins* v. *Pryer* (7) any doubt which may have previously existed as to the effect of a general clause of revocation upon an earlier testamentary exercise of a power must be considered as set at rest. That learned judge relied on *Sotheran* v. *Dening* (8), which, in conjunction with *In re Kingdon. Wilkins* v. *Pryer* (7), met with the strong approval

(1) (1931) 47 Times L. R. 603.
(2) (1840) 2 Curt. Ecc. R. 650, 653.
(3) (1874) L. R. 3 P. & M. 162.
(4) [1892] P. 378.
(5) [1917] P. 256.
(6) [1893] P. 1.
(7) 32 Ch. D. 604.
(8) (1881) 20 Ch. D. 99, 108.

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in this Court of Sir F. H. Jeune in *Cadell* v. *Wilcocks.* (1) In *Sotheran* v. *Dening* (2) Baggallay L.J. said: "It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. . . . . But it must be shewn that it is entirely unreasonable that it should have that effect, otherwise it will be a revocation." *Smith* v. *Thompson* (3) is distinguishable. In that case there was evidence that the testatrix adhered to her intention to benefit the party in whose favour she had previously exercised the power.

Bush James for the remaining defendants.

Bayford K.C. and *W. T. Elverston* for the Claremont Investment Company, incumbrancers on the interest of the first defendant, adopted the argument of the first defendant.

[They referred to *In the Estate of Beech. Beech* v. *Public Trustee.* (4)]

T. Bucknill for the trustees of the will of an earlier settlor, creator of the powers exercised by the testator.

Cur. adv. vult.

April 17. LANGTON J. The point for determination in this case, and the only point, is this: whether the testator, by the clause in his last will revoking all former wills, intended to revoke a will of June 18, 1917, and a subsequent codicil of June 17, 1920, exercising powers of appointment.

Now it is convenient, in most cases, to establish the facts first and apply the law afterwards; but in this case, I think perhaps it will be convenient to reverse that procedure. A decision of my own in *Smith* v. *Thompson* (3) was much pressed upon me by counsel for the plaintiffs, and quite properly so, as being an authority for what he wanted to do in the present case, that is to say, to establish that there was no animus revocandi on the part of Colonel Lowthorpe-Lutwidge on April 27, 1925. Now upon that matter I think it is most material to examine what has been laid down in this Court as to the presumption in cases concerning animus

(1) [1898] P. 21, 26.
(2) (1881) 20 Ch. D. 99, 108.
(3) 47 Times L. R. 603.
(4) [1923] P. 46.

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revocandi, and the first case which I think it is most important to keep in mind is the case of *Gregson* v. *Taylor* (1) in which Hill J. said this : " Assuming that it is no longer a binding rule, in cases where there is no fraud, or suspicion of fraud, that a capable testator who reads, or has read to him, a testamentary paper which he thereafter executes must be taken to know and approve all its contents, yet the direction which a judge should give a jury or himself must be put at least as high as this, that when it is proved that a will has been read over to or by a capable testator, and he then executes it, these circumstances afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence. The presumption is that the words which have been read over to and then signed by a capable testator as his will do represent his will, his whole will, and nothing but his will. And if it is said that they represent his will and something more, then before that something more can be rejected as not being his will it must be established beyond all doubt that it is not his will." That, I think, is most material to bear in mind in dealing with this class of case.

What I said in the case of *Smith* v. *Thompson* (2), which was an unusual case in every way, was this : " For the defendants it was submitted that the Court could not look outside the terms of the document and must not speculate upon what was in the mind of the testatrix. I think in the main that principle is a safe guide and the Court should be very slow to endeavour to interpret words in an instrument which are not ambiguous in a sense contrary to natural sense. As was said in one case, that process comes very near to making a new will. But here the instrument omits to deal with what is practically the bulk of the testatrix' property. On the authority of the cases cited it is possible to look at the surrounding circumstances and consider whether the general revocatory clause was intended to revoke the earlier exercise of the power of appointment." I think that counsel for the defendants in this case was nervous

(1) [1917] P. 256, 261. (2) 47 Times L. R. 603.

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or apprehensive that that last statement goes a little too far, but it must be taken in its context as intended to apply to that case and to the facts of that case. It should not be taken out of that case and cited as a general dictum that it is possible in every case to look at all surrounding circumstances and undertake a vague and unlimited inquiry into what the testator intended. I then went on to say this: "Counsel impressed on me the dictum of Sir Herbert Jenner in *Gladstone* v. *Tempest* (1)." I then cited what Sir Herbert Jenner said there. I have looked at it again and I think that it is as clear a statement as one could wish upon this matter. Sir Herbert Jenner said (2): "But it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocation clause provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit." That is quite concisely stated and exactly what has been pressed upon the Court here, namely that the Court should say it was not the intention of the testator to revoke the legacies and benefits contained in the earlier will of 1917 and the codicil of 1920. I think there is power to act in that way if the Court is satisfied that it was not the intention of the testator to so revoke. But the burden, in that case, is heavy. It is a heavy burden upon a plaintiff who comes into this Court to say: "I agree that the testator was in every way fit to make a will, I agree that the will which he has made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words: nevertheless I say that he did not really intend to revoke the earlier bequests in earlier wills." Quite obviously the burden must be heavy upon anybody who comes to assert a proposition of that kind.

I need not, perhaps, refer to *Collins & Tuffley* v. *Elstone* (3), a decision of Lord St. Helier in which he refused entirely to allow words of revocation to be, as it were, erased, even though the testatrix had been specifically advised that they meant something different from what they really did. If it

(1) 2 Curt. Ecc. R. 650, 653. (2) Ibid. 653.
(3) [1893] P. 1.

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is necessary to make any distinction, it may be said that that case was more a statement of law than of fact. It really is a question in each case for the Court to decide: Is there evidence, and sufficient evidence, to establish that the testator did not intend to revoke? I do not think really the law is more complicated than that.

[The learned judge proceeded to examine the evidence of the circumstances under which the will of April 27, 1925, was executed, and found that the deed of family arrangement was intended by the testator to be a final disposition of his property and that he no longer intended the bequests he had made by the earlier will and codicil to take effect. There was no evidence that the testator was incapable or that such a document as the will of 1925 was beyond his comprehension, and it was clear upon the evidence that the testator thought that he had dealt by the family arrangement with all his property except chattels of small value. The learned judge concluded:]

It would require strong evidence to assist the plaintiffs to discharge the burden upon them, and the evidence, as I appreciate it, is rather strongly the other way. I think that the bulk of the evidence in the case is in favour of the contention of the defendant. The onus is not on him to establish an intention to revoke. If I had to determine it I should say that there was evidence and quite strong evidence to show an intention to revoke, and that whether or no he had the previous will and codicil in mind, the testator intended what he has said in his last will.

The plaintiffs to my mind fail to establish the case which they present or to discharge the burden upon them and the action therefore fails.

Will of April 27, 1925, pronounced for. Will of June 18, 1917, and codicil of June 17, 1920, pronounced against.

Solicitors: *Royds, Rawstorne & Co.; Woodroffes, for David Reynolds, Winchester; Blyth, Dutton, Hartley & Blyth; T. H. O'Connor & Co.; R. H. Douglass.*

R. M. M.

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May 2, 3, 14; June 7.

KNOTT *v.* KNOTT.

Husband and Wife—Proceedings in court of Summary Jurisdiction—Adultery—Petition for Divorce in High Court—Conflict of Jurisdictions—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178—*Summary Jurisdiction (Separation and Maintenance) Acts*, 1895 *to* 1925 (58 & 59 *Vict. c.* 39), *ss.* 6, 7, 10 (15 & 16 *Geo.* 5, *c.* 51), *s.* 2, *sub-s.* 1 (*a*).

During the pendency of a matrimonial suit in the High Court on an issue as to adultery, conflict of jurisdiction may arise from the simultaneous prosecution in a Court of summary jurisdiction under the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, of proceedings incidentally raising the same issue. The issue as to adultery is paramount, the High Court alone having power to dissolve the marriage if adultery be established, while the jurisdiction exercised by the inferior court provides other relief during the continuance of matrimonial status. Proceedings in the inferior court should accordingly be stayed pending the decision of the paramount issue in the High Court.

The respective jurisdictions and the method of harmonizing them discussed.

The reasoning of the decisions in *Rex* v. *Middlesex Justices. Ex parte Bond* [1933] 1 K. B. 72 and *Higgs* v. *Higgs* ante, p. 28 applied.

Appeal of the wife, Hilda Marjorie Knott, from an order of a Court of summary jurisdiction discharging a previous order for her maintenance on the ground that since the making of the previous order the appellant had committed adultery.

The original order was obtained by the appellant at Wealdstone Petty Sessions on July 20, 1931, under the Summary Jurisdiction (Married Women) Acts, 1895 to 1925, for the payment by the respondent, Frederick John Knott, the husband, of 30*s.* per week for the wife and 10*s.* each for two children on the ground of desertion. The summons to discharge this order on the ground that since the date of it the wife had committed adultery came on for hearing before the Court of summary jurisdiction after two adjournments on March 5, 1935. In the meantime, on February 26, 1935, the wife had filed a petition in the High Court seeking dissolution of the marriage on the ground of

the adultery of the husband. The adultery alleged was from August, 1931, onwards. The petition was not served until March 6, 1935, after the hearing of the husband's summons to discharge the order for maintenance. There were considerable arrears of the maintenance due under the original order. On the hearing of the summons by the Court of summary jurisdiction objection to the jurisdiction was taken on behalf of the wife in reliance on *Rex* v. *Middlesex Justices. Ex parte Bond* (1) and *Higgs* v. *Higgs* (2) on the ground of the pending petition in the High Court. The Court of summary jurisdiction overruled this objection, received evidence of the adultery of the wife, and gave consideration to the question whether the fact of there being arrears in the payment of the maintenance constituted conduct of the husband conducing to adultery. In the result the adultery of the wife was found established and the order for maintenance was discharged.

The wife appealed from this decision to the Divisional Court. Numerous grounds were stated in the notice of appeal, but the substantial point pressed in argument was that the Court below had no jurisdiction, and alternatively that the decision was wrong on the facts.

I. H. Jacob (*C. W. Measor* with him) for the appellant. The application of the husband to discharge the order should have been refused having regard to the decisions in *Rex* v. *Middlesex Justices. Ex parte Bond* (1) and *Higgs* v. *Higgs* (2), the latter being a decision of this Court. The High Court was already seised of the matters in question between the parties involving the dissolution of the marriage which was beyond the jurisdiction of the court below. That court misapprehended its jurisdiction. The position is that criticized by Lord Merrivale P. in *Broadbent* v. *Broadbent.* (3) The court below could only find adultery for the limited purpose of rescinding the order for maintenance, while the whole matrimonial status of the parties was involved in the pending proceedings in the High Court. The case was obviously one

(1) [1933] 1 K. B. 72.
(2) Ante, p. 28.
(3) (1927) 43 Times L. R. 186; [1927] W. N. 45.

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for applying s. 10 of the Act of 1895. (1) Apart from jurisdiction the finding of adultery was wrong on the evidence.

R. Winn (*P. B. Morle* with him) for the respondent. *Rex* v. *Middlesex Justices* (2) and *Higgs* v. *Higgs* (3) are distinguishable. In one of the cases custody of children and in the other the amount of maintenance was dealt with in the court below and in both there was concurrent jurisdiction of the two courts, but in this case the subject-matter is an issue of adultery. That may involve the same facts in both courts but there is no concurrence of jurisdiction. The court below cannot dissolve a marriage. On the other hand, for whatever reason, the Legislature has not invested this Court with jurisdiction to set aside the order for maintenance made by the court below: *Bragg* v. *Bragg*. (4) The discharge by the court below of the maintenance order under s. 7 of the Act of 1895 can be attacked if that court has misdirected itself on the facts, but otherwise this Court has no discretion under that section, and any attempt to utilize the discretion given by s. 10 of the same Act would be farcical, the High Court having no power to interfere with the existing order of the court below.

[He also dealt with other consequences of suspending the jurisdiction of the court below. These sufficiently appear in the judgment of the President.]

C. W. Measor in reply.

Cur. adv. vult.

(1) The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6: "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

Sect. 7: ". . . . If any married woman upon whose application an order shall have been made under this Act . . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

Sect. 10: "If in the opinion of a court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction."

(2) [1933] 1 K. B. 72.

(3) Ante, p. 28.

(4) [1925] P. 20.

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June 7. THE PRESIDENT (SIR BOYD MERRIMAN) [after stating the facts:] As regards the second ground of appeal I propose to say no more than that, as at present advised, I am not prepared to accept this contention. Having regard to the view which I take on the question of jurisdiction, it would be most undesirable that this Court should express any opinion upon the merits. At the same time the point with regard to the jurisdiction of the justices appears with full force if it is assumed as an hypothesis, for the purposes of the argument only, that the decision of the justices should not be reversed on the evidence as heard by the justices and now submitted to this Court. The question, stated broadly, is this: whether justices have jurisdiction to decide the issue of a wife's alleged adultery at a time when there is pending in this Court a suit between the spouses in which that very issue must necessarily be decided. It is true that in the divorce suit in this case the wife is the petitioner, and that she has not shown in her petition that she is invoking the discretion of the Court on the ground of her own adultery: and it is also the fact that the husband had not at the time of the hearing before the justices (and so far as I am aware has not yet) filed his answer. He is not obliged to recriminate with a countercharge of adultery (*L.* v. *L.* (1)), and possibly may elect not to do so. It would, of course, have been possible for us to adjourn the hearing of the appeal until it was known whether the husband had counter-charged adultery in his answer. But counsel agreed that it is inevitable that in one form or another, having regard to the evidence tendered before the justices, the question of the wife's adultery will be put in issue, and that the fact that at the material date no counter-charge by the husband had actually been made is immaterial; and the issue in the present case may, therefore, be stated as follows: where there is a charge of adultery made in a Court of summary jurisdiction and at the same time this Court is seised, either directly or by necessary implication, of that issue, have or have not the justices jurisdiction to decide the issue of adultery so long as a suit

(1) [1931] P. 63.

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in which that issue is raised is pending in this Court? To put the matter beyond doubt we direct that if the issue is raised in no other way, the record of the proceedings before the justices shall be submitted to the King's Proctor, so that the facts may be investigated upon his intervention.

In these circumstances I am satisfied that this appeal raises in an acute, though not in the simplest, form the question as to the proper course to be followed where there is a conflict of jurisdiction in a matrimonial dispute between a Court of summary jurisdiction and this Court, and that it is unnecessary to adjourn the appeal to await the closing of the pleadings in the suit.

It might be sufficient to say that I consider that we are bound by the case of *Higgs* v. *Higgs* (1), in which this Court, following the decision of a Divisional Court of the King's Bench Division in *Rex* v. *Middlesex Justices. Ex parte Bond* (2), held that during the pendency of a petition for divorce in the High Court no order for maintenance should be made, under the Summary Jurisdiction and Maintenance Acts, 1895 to 1925, by a Court of summary jurisdiction. I think, however, that it would be better that we should consider the question anew for two reasons: first because, as a matter of history, the decision in *Higgs* v. *Higgs* (1) was given without this Court being made aware that the decision of the King's Bench Divisional Court, which we followed, had been the subject of an appeal (3), and that the Court of Appeal, while upholding the decision of the Divisional Court on another ground, expressly declined to decide the point which we were then considering: and secondly, because counsel, who has argued this case with marked ability on behalf of the husband, submits that the decisions in *Higgs* v. *Higgs* (1) and *Rex* v. *Middlesex Justices* (3), if correct, are distinguishable. The ground upon which he distinguishes these cases is that in both of them the subject-matter with which the justices had dealt in respect both of the facts involved and of the relief sought (in the one case custody and the other maintenance)

(1) Ante, p. 28. (2) [1933] 1 K. B. 72.
(3) [1933] 2 K. B. 1.

was identical with that of which this Court was seised; whereas in this case, while he admits that the issue of adultery may be identical, though the periods covered by the allegation need not necessarily be coterminous, he submits that the relief resulting from the determination of that issue, here and before the justices, is entirely different. The Divorce Court, he argues (rightly, as I think), has no jurisdiction to set aside the order for maintenance: the justices alone have that power under the Act of 1895. In this Court, on the other hand, the finding of adultery on the part of the wife may or may not lead to a decree for dissolution of the marriage, and with that the justices have no concern.

I appreciate the force of that argument, and I do not ignore the difficulties which may arise from holding that the hand of the justices must be stayed until this Court has decided the issue of adultery. For example, as counsel points out, even if it is assumed that, so far as amount is concerned, the order of the justices is reasonable at the time when the petition in this Court is filed, and although the wife would be entitled to alimony pendente lite, it may well be that in certain cases the amount of the alimony would be less than the amount awarded by the justices; and as the husband cannot, though the wife can, take steps to substitute an order for alimony for a subsisting order for maintenance, there would be no opportunity of seeking to reduce the amount of the justices' order if the husband's position changed for the worse during the pending of the suit. He argued further that different methods prevail of enforcing the respective orders, and that, whereas proof of means is necessary before an order for alimony can be enforced by commitment, justices can commit without proof of means. It may be that as a matter of law (*Rex* v. *Richardson* (1)) formal proof of means is not a condition precedent to the making of a commitment order; but I do not think that I ought to assume that justices would be prepared in practice to commit a man to prison for non-payment of the amount of a maintenance order if it were brought to their knowledge that he

(1) [1909] 2 K. B. 851.

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had not the means to pay. It is true also that the opportunities of appealing from a commitment order differ in the two cases: *Ruther* v. *Ruther*. (1) A further complication might arise (though it could not very well arise in this case, having regard to the evidence brought before the justices) if it were left in doubt, after the issue of adultery had been decided in this Court, whether the adultery found included adultery subsequent to the making of the order of the justices. I do not think, however, that this affects the substance of the matter; for, if it is clear that adultery subsequent to the order is found by this Court, that would be conclusive evidence in support of the claim that the order should be discharged: *Pratt* v. *Pratt* (2); whereas if the only adultery found were antecedent to the order it would be a ground for reversing the order itself (see s. 6 of the Act of 1895), if necessary by an extension of the time for appealing. It is right, however, to notice in passing that, by the terms of s. 6, adultery before the date of the order would not be a bar to the making of an order if the husband had condoned or connived at, or by his wilful neglect or misconduct conduced to such adultery. It would, however, by virtue of s. 178 of the Judicature Act, 1925, be the duty of the judge trying the suit to consider these very matters, amongst others. On the other hand, by reason of the amendment to s. 7 of the Act of 1895 by s. 2, sub-s. 1 (*a*), of the Summary Jurisdiction Act, 1925, the right to refuse to discharge the order, if adultery is proved, is limited to one form only of conduct conducing—namely, where the adultery was conduced to by the failure of the husband to make such payments as in the opinion of the Court he was able to make under the order. Here again, however, if in any particular case the conduct of the husband were in question, that limited issue would incidentally be decided by the judge trying the suit.

I have mentioned these points, which may not be exhaustive, to show that I do not fail to recognize that there are undoubtedly practical difficulties in applying the rule laid

(1) [1903] 2 K. B. 270.
(2) (1927) 43 Times L. R. 523; [1927] W. N. 140.

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down in *Rex* v. *Middlesex Justices* (1) and *Higgs* v. *Higgs*. (2) On the other hand the issue of adultery is the most important issue which can be decided as between spouses. With certain exceptions, to which it is unnecessary to refer, it is the essential basis of a petition for dissolution of marriage. If it is undesirable that a Court of summary jurisdiction should decide ancillary matters such as questions of custody or maintenance when there is a suit pending in this Court in which such questions may be raised, it is manifest that it is still less desirable that the most important issue of all should be decided in a Court of summary jurisdiction at a time when it is pending in this Court. The undesirability is seen to be the greater, if, while the suit is pending, a Divisional Court of this Division is obliged to decide on appeal from the justices whether the decision of the justices is right without the advantage, which the judge trying the suit itself would have, of seeing the witnesses. It is quite true (see *Harriman* v. *Harriman* (3), per Cozens-Hardy M.R. and Fletcher Moulton L.J.) that no estoppel binds this Court, as distinct from the parties, on the issue of adultery. In *Hyman* v. *Hyman* (4) the present Master of the Rolls adopted and emphasized this expression of the rule. It is not necessary to decide whether a judgment of the Divisional Court upholding a finding of adultery by the justices is conclusive against the world, as a decision of a judge of this Division would be, but a decision of the justices would not be (see *Pratt* v. *Pratt* (5) and *Broadbent* v. *Broadbent* (6)); but it is at least clear from Order LIX., r. 7, that a decision by way of appeal from the justices upon the merits would be a decision of this Court that adultery had been committed; and although it might not bind the judge who tried the suit, the judgment of Fletcher Moulton L.J., to which I have just referred shows that at the very least it would have the highest evidential value, and would of itself entitle the Court, if it were satisfied that no additional evidence was required,

(1) [1933] 1 K. B. 72; 2 K. B. 1.
(2) Ante, p. 28.
(3) [1909] P. 123, 131, 142.
(4) [1929] P. 1, 28.
(5) 43 Times L. R. 523; [1927] W. N. 140.
(6) 43 Times L. R. 186; [1927] W. N. 45.

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to find the fact proved. I confess that I was unable, in view of the decision in *Harriman* v. *Harriman* (1), to understand that part of counsel's argument in which he argued that it would not even be permissible to refer at the trial to the judgment of this Court.

It seems to me to be in the highest degree undesirable that when a judge of this Division comes to try the cardinal issue of adultery he should be confronted with a judgment of a Divisional Court holding that the fact had already been established before a Court of summary jurisdiction at the very time when the same issue was actually pending in this Court. The inconvenience which may arise in any given case if the decision of the justices is postponed until the issue has been decided in this Court seems to me, by comparison, to be quite inconsiderable. It must be conceded that, if a decision of the justices were affirmed on appeal at a time when no suit was pending, the situation to which I have referred might result. But in those circumstances the justices alone would have jurisdiction at the material time, and there would be no ground whatever for interfering with their jurisdiction under the statute. In a case like the present, however, the Court already has seisin of the cardinal issue of adultery, and ought, unless the statute compels the opposite conclusion, to be able to try that issue upon the evidence of the witnesses, unembarrassed by the fact that a Divisional Court have accepted or rejected, on evidence necessarily viewed at second hand, a decision of the justices given at a time when the very issue was pending in this Court. It might very well be that, on seeing the demeanour of the witnesses, the judge trying the suit would come to a conclusion different from that arrived at by the justices and affirmed by this Court upon the notes of the evidence reported by the clerk of the justices. Though such a result might be justifiable as a matter of logic, it would obviously be most unfortunate, and might very well be characterized in the robust words of Avory J. in *Rex* v. *Middlesex Justices* (2) on which we based our decision in *Higgs* v. *Higgs*. (3)

(1) [1909] P. 123. (2) [1933] 1 K. B. 72, 80.

(3) Ante, p. 28.

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On further consideration therefore I am not prepared to depart from the decision of this Court in *Higgs* v. *Higgs*. (1) Though I recognize the distinction to which counsel has called attention, I think that, whatever may be the ultimate relief sought, the substance of the matter is that, when the issue of the adultery of the wife is pending in both Courts, it should be decided exclusively by this Court. Counsel, however, contended in further illustration of the anomalies which he said would result from a decision to this effect, that the husband might still be liable between the decree nisi and decree absolute to pay under the order of the justices, notwithstanding the finding of adultery. I do not think this is so. It must be plainly understood that the jurisdiction of this Court is regarded as exclusive only when substantially the same issue is raised in both Courts. Similarly when that issue, whatever it may be, has been decided by this Court, there is no further ground for staying the hand of the justices, assuming that the decision of this Court leaves any issue for decision by the justices. In *Lindsay* v. *Lindsay* (2) I have already decided incidentally, upon a consideration of the forms of the decree nisi and the decree absolute respectively, that the decree nisi contains the substantive finding of fact. In that instance it was a finding as to the paternity of a child of the marriage. I think that the same principle applies to a finding of adultery, notwithstanding that cause may be shown against the granting of the relief prayed on the ground that the Court was deceived as to the facts or for some other reason. In my opinion the moment the decree nisi has been pronounced upon a finding that the wife has been guilty of adultery, it is at once open to the justices to apply that finding on any application, whether already subsisting or newly made, for the discharge of their original order, and to do so without further evidence than is required to show that the adultery found is subsequent to their order : *Pratt* v. *Pratt*. (3) If that finding were finally reversed a fresh order could be made by the justices in the wife's favour ; while if a new

(1) Ante, p. 28. (2) [1934] P. 162, 169.
(3) 43 Times L. R. 523 ; [1927] W. N. 140.

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trial were ordered she could get alimony pendente lite. One other point must be noticed. It was argued that the Act of 1895 provided by s. 10 a means of escaping the undesirable consequences to which I have alluded. The same point arose under the corresponding section of the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), and was considered by the Court of Appeal in *Rex* v. *Middlesex Justices*. (1) Scrutton L.J., without deciding the matter, appears to have inclined to this view. Slesser L.J. however, again without deciding the matter, plainly indicates that he considers that the section supports the view that the jurisdiction of the Divorce Court is exclusive. In considering the application of this section it is clear that if the words: "The matters in question between the parties," refer to the relief sought, namely the discharge of the order for maintenance, that matter could not possibly be referred to the High Court, since it is conceded that the justices alone have jurisdiction to make that order. In this view the section would have no application. If, on the other hand, the words quoted refer to the decision of the issue of fact I respectfully agree with the view of Slesser L.J. that it would be inapt for the Legislature to give to a Court of summary jurisdiction the right to decide whether or not it was more convenient that an issue of which the High Court was already seised should be decided by the High Court. I think that the existence of that section supports the view which I have expressed. If, on the other hand, the presence of that section in the Act tends the other way, it is unfortunate that in this case, as I think, it is not possible to deal with this matter under the section. If the jurisdiction of the justices and of this Court is concurrent I am bound to say that I should feel that a decision of the justices that it was more convenient that they should try the issue of adultery than that this Court should do so would be open to challenge on appeal. But I also think that it would be a condition precedent to any attempt to upset their decision that the justices themselves should have been invited to act under s. 10 and should have

(1) [1933] 2 K. B. 1, 10, 13.

declined to do so. In this case it is admitted that they were not invited to do so ; and I should not be prepared, therefore, to deal with the point in the absence of a decision by them. It remains to consider what is the proper order to be made. In my opinion the finding of the justices should be set aside on the ground that they should not have proceeded to a determination of the matter after their attention had been called to the conflict of jurisdiction and to the authorities, and that the matter should be remitted to them for rehearing, but that such hearing should be stayed until the determination of the issue of the wife's adultery by this Court. This will keep the complaint alive. I need scarcely add that if in this, or in any other case in which this question arises, this Court were satisfied that the suit was not being duly prosecuted, but was merely being used for the purpose of prolonging the payments under the order, the Court would have ample power to deal with this matter in such a way that the justices would regain jurisdiction.

BUCKNILL J. The question for decision in this case is whether the justices had jurisdiction to hear the application of Frederick Knott that an order made against him under the Summary Jurisdiction (Separation and Maintenance) Acts to pay his wife 30*s*. a week and 10*s*. a week for each of the two children of the marriage should be discharged on the ground that his wife had committed adultery since the making of the order. The objection to the jurisdiction is based upon the fact that before the justices heard the application of the husband, his wife filed a petition in the High Court for divorce on the ground of her husband's adultery.

In my opinion the reasoning of the decision of this Court in *Higgs* v. *Higgs* (1) applies to this case. In that case the husband left his wife, who then took out a summons under the Summary Jurisdiction Acts for a weekly payment to her on the ground of the husband's neglect to maintain her. Before the hearing of this summons the husband filed a petition for divorce. Before the petition for divorce was heard and determined

(1) Ante, p. 28.

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the justices made an order for a weekly payment to the wife. The husband then appealed to the Divisional Court, and succeeded on the ground that the justices had no jurisdiction to make the order because the petition for divorce was pending in the High Court.

As I understand it, the decision of the Divisional Court was based on the principle that the Legislature could not have intended to give concurrent jurisdiction to the justices over a matter which is already pending in a suit in the High Court, with the possible result that the justices might make one order and the High Court might make an exactly opposite order in the same matter.

It appears too that s. 10 of the Summary Jurisdiction (Separation and Maintenance) Act, 1895, has an important bearing on the question before the Court in this case. I do not think that the words "matters in question" in s. 10 refer to the issue of adultery by the wife, which may be raised under the Act, if at the time when it falls to be determined by the justices the same issue has been raised in divorce proceedings in the High Court.

The legal result of proof of the adultery of the wife in divorce proceedings in the High Court is so different from the legal result of proof of the adultery of the wife under s. 6 or s. 7 of the Summary Jurisdiction Act, that it seems to me to be impossible to suppose that the Legislature has empowered the justices to decide whether the question of the wife's adultery in such a case "would be more conveniently dealt with" by the High Court or by the justices. I also doubt whether "the order" which the justices may refuse to make under s. 10 was intended to apply to an order for discharge of a previous order on the ground of the wife's adultery. The concluding words of s. 7 are peremptory. The "Order shall upon proof thereof (i.e. the adultery of the wife) be discharged." Sect. 10, on the other hand, enables the justices to refuse to make the order. Now, if s. 10 of the Act does not apply to a case where the issue of the wife's adultery is already pending in the High Court at the time when the husband seeks to obtain from the justices the

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discharge of an order for maintenance on the ground of her adultery, the position is that the justices have no power of exercising a discretion whether they shall decide that issue or leave the issue to be dealt with by the High Court, and are bound to hear and determine the issue as to the wife's adultery although the High Court may decide the exact opposite the next day. This seems to me to be such an unreasonable result that I think that the Legislature cannot have intended it, and therefore I think that the Summary Jurisdiction Act, 1895, must be so interpreted as to exclude the jurisdiction of the justices to hear and determine the issue of the wife's adultery, when that issue is pending in divorce proceedings in the High Court.

I agree with the learned President's judgment that in this case the issue as to the wife's adultery must be raised during the course of the proceedings, either by the husband or at the instigation of the King's Proctor, and that the issue is therefore pending in divorce proceedings in the High Court.

For these reasons this appeal in my opinion should be allowed.

Solicitors for the appellant: *Hiscocks & Co.*

Solicitors for the respondent: *Pierron & Morley.*

R. M. M.

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July 23, 31.

Divorce—Settlement of wife's property—Provision for husband and children—Material matters for the consideration of the Court—Authorities examined—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 191, *sub-s.* 1.

Sect. 191, sub-s. 1, of the Judicature (Consolidation) Act, 1925, which confers upon the Court a discretionary power after a decree for divorce or judicial separation to order a settlement of the property of a wife guilty of adultery for the benefit of the innocent party and the children of the marriage or any of them, is not intended to be used as a punishment of the wife or indirectly through the wife of a co-respondent whom she may marry. The main question for the Court is the nature and extent of the pecuniary prejudice

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caused to the husband and children of a guilty wife by the breaking away of the wife with her property from the common home; the relative financial positions of the husband and wife after divorce are also material. The object of the section is to enable the Court as nearly as may be to restore the pecuniary status of the parties as existing before the termination of the married life.

PETITION for the settlement of the property of a guilty wife pursuant to the Judicature (Consolidation) Act, 1925, s. 191, sub-s. 1. (1)

There were five children of the marriage of the petitioner and the respondent aged respectively 28, 27, 25, 23 and 19 years. On February 4, 1935, a decree was made absolute dissolving the marriage on the ground of the adultery of the respondent wife. By a petition of the same date the husband prayed for a settlement of the free property of the wife for the benefit of the children of the marriage. There was also a petition to vary a post-nuptial settlement on the wife, but the parties had agreed to accept the report of the registrar on the latter petition, with the result that the reversionary interest in the trust funds of the settlement was assured as far as possible to the children of the marriage, and no question remained for the decision of the Court on this part of the case. It was not questioned that the husband, who was 57 years of age, had an income on the triennial basis of 7430*l.* or thereabouts. He had securities to the value of 22,000*l.* and upwards, was partner in a brokerage firm with a capital of 5000*l.*, and had other property taken as worth 16,000*l.*

The free property of the wife consisted of investments producing 530*l.* per annum, besides a freehold worth 2000*l.* In addition she had brought into settlement property producing about 350*l.* per annum.

The positions of the five children, for whose benefit a

(1) Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 191, sub-s. 1: "If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or any or either of them."

settlement of this free property was sought, were as follows: There was a married daughter on whom the wife had already settled 2000*l.* A second daughter was engaged to be married. A son was self-supporting; a second son was in the petitioner's business, while the youngest child, a son aged 19, had just left school. The respondent had further given her married daughter the sum of 2000*l.*

The respondent was about 52 years of age and had married the co-respondent. The registrar reported that no settlement of the free property of the respondent should be ordered.

The petitioner moved to vary the report and asked that so much of the free property of the respondent should be settled for the benefit of the children as the Court might think fit.

F. R. Evershed K.C. (*H. B. Durley Grazebrook* with him) for the petitioner. The underlying principle with regard to the settlement of a wife's property when the marriage has been dissolved on the husband's petition is set out in *Lorriman* v. *Lorriman* (1), quoting *March* v. *March and Palumbo* (2): "It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman." The Court will consider what would have been the position of the children if the marriage had not been broken up by the wife. The Court must put the children in the same position in which they would have been in all human probability if the marriage had not been dissolved. There is only one reported case in which a settlement was refused: *Schofield* v. *Schofield.* (3) There the facts were entirely different. Here there is no claim to limit the life interest of the wife herself. In *Bacon* v. *Bacon* (4) the husband claimed a settlement on behalf of the children as here, and the principle adopted was that the guilty wife should have no controlling power beyond her life interest.

(1) [1908] P. 282, 289.
(2) (1867) L. R. 1 P. & M. 440, 443.
(3) (1891) 64 L. T. 838.
(4) (1860) 2 Sw. & Tr. 86.

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Midwinter v. *Midwinter* (1) affords a good illustration of the operation of the section. At the time of the settlement on the daughter in the present case 4000*l.* represented about a fifth of her mother's capital. The bulk of the wife's property should be settled.

Bayford K.C. (*F. L. C. Hodson* with him) for the respondent. The registrar was right in submitting that there should be no settlement. *Lorriman* v. *Lorriman* (2) does not assist, as there was no marriage settlement in that case. The husband's income is over 7000*l.*, with a capital of some 43,000*l.* He brought nothing into the settlement for the children. In effect he is now saying that though he wants nothing for himself he wants to be relieved of the responsibility of settling anything on the children and to put it on his former wife's shoulders. There is no need for any present provision for the children, and if it were made by way of a reversionary interest they could dispose of it on coming of age. If there had been no divorce the position would have been that the wife could properly have said that she had made substantial provision for her husband and children and she could not have been expected to settle any more. Nevertheless she is not likely now to put her children in any different position than before, and she has agreed to the variation of the existing settlements. The Court always looks at what the wife has done for her children, and she has expressed her intentions as to the children, who have not themselves made any application. If the Court takes the view that there should be a settlement, it should bear in mind that there is no reported case in which the Court has settled on children more than half the wife's fortune where the figures have been at all similar to those here.

[He referred to *March* v. *March and Palumbo* (3); *Schofield* v. *Schofield* (4); *Bacon* v. *Bacon* (5); and *Midwinter* v. *Midwinter*. (1)]

Grazebrook in reply referred to *Milne* v. *Milne and Fowler*. (6)

Cur. adv. vult.

(1) [1893] P. 93.
(2) [1908] P. 282.
(3) L. R. 1 P. & M. 440.
(4) 64 L. T. 838.
(5) 2 Sw. & Tr. 86.
(6) (1871) L. R. 2 P. & M. 295.

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July 31. BUCKNILL J. This is a motion to vary the report of the registrar on a petition by the husband petitioner for a settlement of the free property of the guilty wife. There is also a motion to vary the report of the registrar on a petition by the husband to vary a post-nuptial settlement on the wife, but the report of the registrar on this latter petition is now accepted by both parties, with one agreed variation as to the appointment of fresh trustees. The respondent's power of appointing fresh trustees is to be extinguished, and if necessary the petitioner and the respondent are each to have the power of appointing one trustee, in the event of the present trustee, Lloyds Bank, retiring.

The variations of the post-nuptial settlement have, however, some bearing on the present motion, as their result is that the children are fairly certain to receive the reversionary interest in the trust funds of the post-nuptial settlement.

On the motion before me to vary the report of the registrar on the petition to settle the free property of the wife there was considerable argument. The registrar reported that no order be made for a settlement of the wife's property. Counsel on behalf of the husband asked that this report be varied and that a major portion of the wife's free property should be vested in trustees on trust that the wife should retain the whole of the income therefrom during her life, and that after her death the property should pass to the children of her marriage with the petitioner. The petitioner was willing that the securities should not be affected in order that the wife should continue to receive the same annual income. [The learned judge proceeded to deal with the facts as stated and read the material section of the Judicature (Consolidation) Act.] The section, therefore, invests the Court in this case with a discretionary power to make such settlement of the wife's property as it thinks reasonable for the benefit of the husband and of the five children of the marriage or any of them. The section is not penal, it is not intended to be used as a punishment of a guilty wife, or even as a punishment indirectly of a co-respondent through the wife. On this aspect of the matter, however, there are some valuable remarks of Lord

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Penzance in *March* v. *March and Palumbo* (1) which were quoted by counsel in argument. If the settlement was asked for merely in order to deprive the respondent and her present husband of pecuniary benefit by way of punishment, it might be necessary for the Court to investigate the circumstances leading up to the adultery; but these circumstances have not been investigated on the motion before me, or before the registrar on the hearing of this petition.

Various cases were cited to me which throw light on the principles which should guide the Court in exercising its discretion. Consideration of these cases shows that the main question for the Court is the nature and extent of the pecuniary prejudice caused to the husband and the children of the marriage by the dissolution of the marriage and the breaking away of the wife with her property from the common home. In considering this question, the Court has also to bear in mind the financial position of the wife after the dissolution of the marriage, and to weigh it with the similar position of her former husband and her children after the divorce. With this consideration in view it is necessary now to state the pecuniary status of the husband and the children at the time when the marriage was dissolved. [The learned judge proceeded to deal with the figures of the respective means of the parties as found by the registrar in his report and continued:] At the hearing before me I was informed that about two years ago the respondent had given another 2000*l.* to the eldest daughter to purchase a share in a school, making a total of 4000*l.* in all transferred by the respondent to the eldest child of the marriage. The respondent's annual income is 881*l.* gross, of which, as I have already said, 350*l.* are the proceeds of the funds of the post-nuptial settlement and 531*l.* are the proceeds of her free property. In other words, it is about one-tenth of the petitioner's total gross income, including his investments and the annual value of his house; but the wife's income is derived from stocks and shares, some of which are first-class securities, while the petitioner's income is mainly earned income. Taking these facts into consideration, I do

(1) L. R. 1 P. & M. 440, 443.

not consider that the dissolution of the marriage has seriously prejudiced the pecuniary status of the husband and the children. Whilst the wife was living at home with her husband there is no evidence that she contributed anything substantial to the maintenance of the establishment. Her fair share after deduction of income tax and after paying for her dress and her own personal expenses would be negligible, if in strict proportion to her own and the petitioner's income.

On the hearing before me it was stated on behalf of the petitioner that he did not ask the Court to make any order which would cause any loss of income to the wife during her life. The petitioner did not ask for any benefit for himself out of his wife's property; all he asked was that a part of his wife's free property should be so tied up that her children and not some one else, and in particular the co-respondent, should receive it after her death. It was argued that the wife would almost certainly have left her property to the children if the marriage had not been dissolved.

Counsel on behalf of the petitioner relied especially on the judgment of Bucknill J. in *Lorriman* v. *Lorriman* (1), where in a somewhat similar case to this the learned judge said: "The underlying principle is that the Court must try to ascertain the nature and extent of the pecuniary change by the wife's criminality, and in order to see that it must look at the probable pecuniary position which the husband, the wife, and the issue of the marriage would have occupied if the marriage had not been dissolved." Reference was also made in that case to *Hartopp* v. *Hartopp* (2), where Sir Gorell Barnes in a somewhat similar case said that the guiding principle was that the Court ought to place the petitioner and the children in a position, as nearly as circumstances will permit, the same as if the family had not been broken up. Applying this test, I do not find that before the home was broken up by the wife's adultery the children received or were likely to receive any substantial pecuniary benefit from their mother. It is true that the eldest daughter on her marriage, received 4000*l.* from her mother but the Court is not asked to make any order

(1) [1908] P. 282, 289. (2) [1899] P. 65, 72.

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which would have the effect of giving any present pecuniary benefit to a child of the respondent apart from the value of a reversionary interest in the capital. The children are to receive no benefit while the mother is alive, and the mother may live for many years. As regards the future there is no sufficient reason for thinking that the wife will lose her affection for her children. On the other hand, I think it is probable that she will leave the bulk of her free property to her children if she retains a free hand in the matter. As time goes by, the respondent will probably be in a position to know which of her children is in most need of financial assistance. As regards the respondent, it may be a serious embarrassment to her if she has to tie up the bulk of her free property now. It is possible that in the future she may wish to give some of her capital to one of her children, if in need of pecuniary assistance, and her power to do this would be taken away in so far as a settlement of her property is now ordered by the Court.

The object of the section is to enable the Court, as nearly as may be, to restore to a reasonable degree the pecuniary status of the parties before the dissolution, and therefore it is material to consider that if the wife is deprived of all right to dispose of the bulk of her capital now, to that extent she loses the right to benefit during her life any of her children by transferring to him or her part of that capital, of which he or she may be in need. Taking into account the present financial status of the husband, the ages and position of the children, and the amount of the free property of the wife, it does not seem to me, after anxious reflection upon the matter, that this is a case in which the Court should order a settlement of the wife's property.

Solicitors: *Parker, Garrett & Co.; Walter Crimp & Co., for Harold Michelmore & Co., Newton Abbot.*

R. M. M.

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